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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1280

FIRST INVESTMENT ANNUITY COMPANY OF AMERICA,
Petitioner

v.

J. WILLIAM MILLER, SECRETARY OF THE TREASURY OF THE UNITED STATES, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

First Investment Annuity Company of America ("FIAC")[1] petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

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[1] There were two plaintiffs in this suit in the district court, FIAC and its then parent corporation, Investment Annuity, Inc. ("IAI"). Both were represented by the same counsel. However, following IAI's sale of the stock of FIAC to Life Insurance Company of North America, FIAC and IAI were separately represented in the court of appeals. This petition is submitted on behalf of FIAC.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra,* pp. 1a-20a) is reported at 609 F.2d 1 (1979). The memorandum opinions of the United States District Court for the District of Columbia, dated July 12, 1977 and November 9, 1977, are reported at 437 F.Supp. 1095 (1977) and 442 F.Supp. 681 (1977), respectively. These opinions, together with the orders of the district court dated September 30, 1977 and December 8, 1977, are contained in Appendix B, *infra,* pp. 21a-64a.

JURISDICTION

The judgment of the court of appeals (Appendix C, *infra,* p. 65a) was entered on October 5, 1979. By order dated January 3, 1980, Chief Justice Burger extended the time for filing a petition for writ of certiorari to and including February 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner is a party aggrieved by a revenue ruling and has no access to judicial review other than this suit for a declaratory judgment and injunctive relief. In *Bob Jones University* v. *Simon,* 416 U.S. 725 (1974), this Court held that the Anti-Injunction Act barred a suit for such relief where the party had other access to judicial review, but said, "This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different." *Id.* at 746.

The questions presented, therefore, are those explicity left open by *Bob Jones University:*

1. Whether the Anti-Injunctive Act should be interpreted to bar a suit for injunctive relief when the party aggrieved has no other access to judicial review.

2. Whether, if the Anti-Injunction Act is so construed, the Act is constitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause and the pertinent provisions of Article III of the Constitution, the pertinent provisions of sections 801(g) and 7421 of the Internal Revenue Code of 1954, as amended (the "Code") and 28 U.S.C. § 2201 are set forth in Appendix D, *infra,* pp. 67a-69a.

STATEMENT OF THE CASE

This is a suit for declaratory judgment and injunctive relief in which FIAC seeks to have *Rev. Rul. 77-85,* 1977-1 C.B. 12, declared illegal and to restrain respondents from applying the Ruling.

FIAC entered the business of selling investment annuities in 1965 in reliance upon section 801(g)(1)(B) of the Code, enacted in 1962,[2] and upon rulings of the Internal Revenue Service ("IRS"). FIAC's investment annuity business was made possible only because, due to section 801(g)(1)(B), the tax consequences of investment annuities, for both the insurance company and the policyholders, are the same as for other kinds of variable annuities. FIAC invested approximately $18 million in developing its business.

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[2] Section 801(g)(1)(B) was added to the Code by the Act of October 23, 1962, P.L. No. 87-858, 76 Stat. 1134.

In 1977, the IRS issued *Rev. Rul. 77-85* which reversed the IRS's prior rulings, thereby destroying the investment annuity as a viable product along with FIAC's investment and its business. (JA 66, 85; Appendix A, *infra,* pp. 4a-5a)[3]

FIAC is incorporated in the Commonwealth of Pennsylvania and was licensed in Pennsylvania as a legal reserve life insurance company in 1963. Since 1965, FIAC has sold only one product—investment annuities of various types. (JA 66; Appendix B, *infra,* pp. 23a-24a.)

Under an annuity contract, including the investment annuity, the policyholder purchases the right to receive payments starting at a specified date and continuing as long as the policyholder lives. The investment annuity is a form of variable annuity which means that the annuity payments vary depending upon the investment performance of assets held in a segregated asset account. The only difference between an investment annuity and other variable annuities is that, under an investment annuity, the policyholder (rather than the insurance company) directs the investment of the assets in the segregated asset account maintained with respect to his contract. (Appendix B, *infra,* p. 22a.)[4]

Starting in 1965, and continuing into 1977, the IRS issued a series of rulings to both FIAC and its policyholders holding that FIAC's investment annuity contracts are "contracts with reserves based on a segregated asset account" within the meaning of section 801(g)(1)(B) of the Code. This meant that FIAC, rather than the policyholder, was taxable on the investment income of the account. (Appendix A, *infra,* pp. 4a-5a.)

[3] "JA" references are to the separately bound Joint Appendix which was filed by the parties in the court of appeals.

[4] A complete, technical description of the investment annuity is set forth at Appendix A, *infra,* pp. 3a-4a, and need not be repeated here.

FIAC relied upon these rulings in building its investment annuity business and establishing a nationwide marketing organization. Since 1966, over $18 million has been contributed to the capital and surplus of FIAC for the purpose of permitting it to develop, market and sell investment annuities. All of these funds were raised in public and private offerings in reliance upon the statute and the IRS's rulings. By 1977, FIAC was represented by more than 4,500 independent insurance agents, and it was licensed to do business in 42 states and the District of Columbia. But, due to heavy start-up costs as an insurance company and the development of a nationwide organization, FIAC had a cumulative net loss, as of December 31, 1976, of approximately $14 million. FIAC's first profitable year (approximately $1.6 million) was in 1976. (JA 66-67, 85.)

Then, on March 9, 1977, the IRS announced *Rev. Rul. 77-85* which reversed prospectively the 12 years of consistent administrative practice on which FIAC had relied in establishing and conducting its business. Specifically, the Ruling concluded that:

(1) The investment annuities sold by FIAC are not contracts as described in section 801(g)(1)(B) of the Code;

(2) The policyholder is the owner of the assets held in the custodian account; and

(3) Any income received by the custodian with respect to the assets in the account is includible in the gross income of the policyholder.

In recognition of the fact that this Ruling reversed a well-established, consistent IRS position, the IRS "grandfathered" contracts entered into before March 9, 1977; *i.e.*, only new contracts sold after that date, or existing contracts with respect to which additional annuity purchase contributions were made after that date, are subject to the "new" rules. (JA 59, 282; Appendix A, *infra,* p. 5a).[5]

The effect of *Rev. Rul. 77-85* on FIAC has been catastrophic. The Ruling has made FIAC's annuity contracts commercially so unattractive as to be unsaleable. As a consequence of the Ruling, moreover, FIAC has been prevented by the Insurance Commissioner of Pennsylvania from making any more sales of investment annuities. In addition, the Securities and Exchange Commission withdrew its prior "no-action" position upon which FIAC relied in selling investment annuities. Accordingly, since early March, 1977, FIAC has not sold any new investment annuity contracts, nor (except as permitted under *Rev. Rul. 77-85* with respect to employer contributions under certain qualified retirement plans) received any additional contributions under an existing contract. (JA 67-68; Appendix A, *infra*, p. 5a.)

FIAC and IAI initiated this action for declaratory judgment and injunctive relief in May, 1977 under 28 U.S.C. §§ 1331(a), 1340 and 1361. This action constitutes FIAC's only access to judicial review. In view of (a) the prospective nature of *Rev. Rul. 77-85* (whereby existing policyholders have been "grandfathered"), (b) FIAC's inability to sell any new investment annuities, and (c) the fact that *Rev. Rul. 77-85* did not adversely affect FIAC's own tax liability, the Ruling cannot be tested through the usual forms of tax litigation since there is no taxpayer, either present or prospective, whose tax liability is adversely affected by *Rev. Rul. 77-85.*

[5] The Ruling does make a limited exception for certain already existing contracts which involve employer contributions under certain qualified retirement plans.

In response to the complaint, respondents filed a motion to dismiss on the asserted grounds that, due to the Anti-Injunction Act (section 7421(a) of the Code) and the federal tax exception to the Declaratory Judgment Act (28 U.S.C. § 2201), the district court lacked jurisdiction to grant the requested relief. After concluding (Appendix B, *infra,* pp. 35a-36a) "both as a matter of fact and as a matter of law, that this case is one in which the aggrieved party has *no access at all* to judicial review," the district court denied respondents' motion. Then, after concluding "that the Service was improperly motivated by considerations of tax reform when it issued Revenue Ruling 77-85," (Appendix B, *infra,* p. 58a) the district court also declared the Ruling to be erroneous, and enjoined respondents from applying it.[6]

The court of appeals reversed on the jurisdictional issue, stating that it was compelled by the decisions of this Court in *Enochs* v. *Williams Packing Co.,* 370 U.S. 1 (1962) and *Bob Jones University* v. *Simon,* 416 U.S. 725 (1974) to hold that the Anti-Injunction

[6] The court did provide, however, for the retroactive assessment of taxes if respondents appealed and ultimately prevailed. (Appendix B, *infra,* pp. 63a-64a.)

Act barred FIAC's action, even though the admitted effect of so applying the Act would be to foreclose all judicial review of the IRS's action. (Appendix A, *infra,* p. 11a.) The court also held that the reversal of prior administrative practice by *Rev. Rul. 77-85,* which had such devastating effect on FIAC, did "not invade any property interest cognizable under the due process clause." (Appendix A, *infra,* p. 13a.) Accordingly, notwithstanding the IRS's prior administrative practice, the fact that FIAC has no other access to judicial review, and the irreparable injury to FIAC, the court held that "there is no basis for a claim that [the] government has 'deprived' [it] of property," thus concluding that the denial of judicial review in this case did not rise to the level of constitutional infirmity. (Appendix A, *infra,* p. 14a.) In view of its disposition of the jurisdictional issue, the court of appeals did not reach the merits of *Rev. Rul. 77-85.*

REASONS FOR GRANTING THE WRIT

This is a case of first impression. It presents the issue expressly left open in *Bob Jones University* v. *Simon,* 416 U.S. 725, 746 (1974), whether the Anti-Injunction Act bars a suit for injunctive relief in "a case in which an aggrieved party has no access at all to judicial review." If FIAC may not maintain this suit to have *Rev. Rul. 77-85* declared illegal and to restrain respondents from applying that Ruling, FIAC can never vindicate its statutory rights.

The government's jurisdictional claim is an extraordinary one: the IRS may deprive FIAC of rights granted by Congress, and no court, federal or state,

may vindicate the statute. This claim goes far beyond Congress' intent in enacting the Anti-Injunction Act, beyond any conceivable rationale for the law, and beyond any of this Court's previous decisions. As this Court has repeatedly stated, the purpose of the Act is to permit the government to collect taxes without judicial interference, with any legal issues being determined in a suit for refund; there was no intent to deny judicial review altogether. Here, as a consequence of FIAC's cessation of business due to *Rev. Rul. 77-85* and FIAC'S inability to sell any new investment annuities, no taxes are being or will be asserted against FIAC or any policyholder. Thus, this suit interferes with no taxes which would otherwise be assessed or collected, and, moreover, absent this suit, FIAC has no opportunity for any judicial review.

If the Anti-Injunction Act is interpreted in this perverse fashion, serious constitutional problems result: persons in the position of FIAC can be deprived of their property without due process of law; Congress is held to have the power to deny jurisdiction to all federal courts and all state courts to protect individuals from the coercive power of government; and uncontrolled delegation of lawmaking power to the IRS and to other federal agencies is declared permissible. These are positions that this Court has never ratified and ought not ratify now by allowing the court of appeals' decision to stand.

THIS COURT SHOULD GRANT THE WRIT TO DECIDE THE QUESTION LEFT OPEN IN *BOB JONES UNIVERSITY* WHETHER THE ANTI-INJUNCTION ACT BARS A SUIT FOR INJUNCTIVE RELIEF WHEN JUDICIAL REVIEW IS OTHERWISE UNAVAILABLE.

A. The Writ Should Be Granted To Determine Whether, As a Matter of Statutory Construction, the Anti-Injunction Act Bars a Suit Where There Is No Other Access To Judicial Review.

1. The decision of the District of Columbia Circuit in this case presents the issue which this Court expressly referred to and left unresolved in *Bob Jones University, supra.* That issue is whether the Anti-Injunction Act (and, by parallel construction, the federal tax exception to the Declaratory Judgment Act)[7] bars a lawsuit seeking injunctive relief when no suit for a refund is available and no other mode of judicial review is open. The court of appeals held that the Act does just that.

The court of appeals said it was compelled to this result by this Court's decisions, citing *Bob Jones University* for the proposition that the exception in

[7] Respondents also contended below that this suit is barred by the federal tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201, even if not barred by the Anti-Injunction Act. But the scope of that exception has been held to be coterminous with the Anti-Injunction Act. *Eastern Kentucky Welfare Rights Org.* v. *Simon,* 506 F.2d 1278, 1283-1285 (D.C. Cir. 1974), *rev'd on other grounds,* 426 U.S. 26 (1976); *Jules Hairstylists of Maryland, Inc.* v. *United States,* 268 F.Supp. 511 (D.Md. 1967), *aff'd,* 389 F.2d 389 (4th Cir. 1968), *cert. denied,* 391 U.S. 934 (1968); *Tomlinson* v. *Smith,* 128 F.2d 808 (7th Cir. 1942). In view of its holding below with respect to the application of the Anti-Injunction Act, the court of appeals did not reconsider respondents' argument that the federal tax exception to the Declaratory Judgment Act is more preclusive than the Anti-Injunction Act. This Court has not yet had an occasion to decide this question. See footnote 7 in *Bob Jones University, supra,* at 732-733.

Enochs v. *Williams Packing Co.,* 370 U.S. 1 (1962) constitutes the only permissible exception to the Anti-Injunction Act.[8] Specifically, the court of appeals stated (Appendix A, *infra,* p. 11a):

> "The clear meaning of *Bob Jones University's* reference to *Williams Packing* as the "capstone" of judicial construction under the Act is that *Williams Packing* defines the sole basis for judicially-created exceptions to the Act. As a result, we cannot agree with appellees and the district court that the Act and the pertinent precedents countenance a general exception *wherever* a matter will otherwise escape judicial review."

The court of appeals thought that the only question left open in *Bob Jones University* was constitutional. That seems clearly incorrect.

In *Bob Jones University,* a private university that had enjoyed tax-exempt status under section 501(c)(3) of the Code, sued to prevent the IRS from revoking that status. The University alleged irreparable injury because of substantial federal tax liability and the loss of contributions. This Court held the suit barred by the Anti-Injunction Act, and met a due process objection with the observation that the University had available other avenues of legal redress:

> "This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different." 416 U.S. at 746.

[8] In *Williams Packing,* this Court fashioned an exception to the Act where (370 U.S. at 7) "it is clear that under no circumstances could the Government ultimately prevail" because in such a case "the central purpose of the Act is inapplicable."

The Court pointed out that either a petition to the Tax Court to review a proposed deficiency in income taxes or a suit for a refund was available. *Ibid.*

The court of appeals' conclusion that *Bob Jones University* foreclosed the question here of statutory interpretation, as opposed to constitutional challenge, is incorrect for two reasons.

First, the presence of the serious unresolved constitutional issue means, given this Court's frequent practice of reading statutes to avoid constitutional problems (e.g., *Weinberger* v. *Salfi,* 422 U.S. 749 (1975)), that the issue of statutory construction is necessarily also still open.[9]

Second, quite apart from the constitutional issue, the proper construction of the Anti-Injunction Act in a case like this remains unresolved. The issue presented in *Williams Packing* and *Bob Jones University* is far different from the issue presented here. In both of those cases, the parties seeking injunctive relief were able to contest the positions of the IRS through traditional refund suits. The issue, therefore, was whether such parties could nonetheless still obtain an injunction, thereby accelerating the judicial review which would otherwise be available at a later time, in view of their exceptional circumstances which assertedly rendered their legal remedies inadequate. In this

[9] This is particularly so with respect to the Anti-Injunction Act in view of this Court's statement in *Commissioner* v. *Shapiro,* 424 U.S. 614, 633 (1976) that:

> "we are satisfied that the standard required by the Anti-Injunction Act is at least as favorable to the taxpayer as that required by the Constitution; and that the standard to be applied by the District Court will therefore not be affected by the resolution of the constitutional issue."

case, the issue is whether FIAC will be able to obtain any judicial review.

2. FIAC's position is perfectly consistent with the result in *Williams Packing* and the other cases construing the Anti-Injunction Act.[10] The key to applying and interpreting *Williams Packing* is that the Court there held the Anti-Injunction Act to be applicable only where its application is consistent with its "central purpose." 370 U.S. at 7. In this regard, *Bob Jones* stated:

> "The Court has interpreted the principal purpose of [the statutory] language to be the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference, 'and to require that the legal right to the disputed sums be determined in a suit for refund.' *Enochs* v. *Williams Packing & Navigation Co.,* [370 U.S. 1] *supra,* at 7. . . . The Court has also identified 'a collateral objective of the Act—protection of the collector from litigation pending a suit for refund.' *Williams Packing, supra,* at 7-8." 416 U.S. at 736-737.

Neither of these objectives is served where, if *Rev. Rul. 77-85* is allowed to stand, there will be neither a collection of taxes nor a suit for a refund. No taxes are delayed by this action because, due to the prospective nature of the Ruling and FIAC's inability to sell new

[10] Nor did FIAC's position originate with it. It was perfectly in keeping with other cases which had considered whether the Anti-Injunction Act should not apply if there were no other access to judicial review. *National Restaurant Ass'n* v. *Simon,* 411 F.Supp. 993 (D.D.C. 1976); *International Telephone & Tel. Corp.* v. *Alexander,* 396 F.Supp. 1150 (D.Del. 1975). FIAC's position appeared to be supported by the District of Columbia Circuit. *Eastern Kentucky Welfare Rights Org.* v. *Simon,* 506 F.2d 1278 (1974), *rev'd on other grounds,* 426 U.S. 26 (1976).

investment annuities, there are no taxpayers, either present or prospective, who will owe any tax as a consequence of *Rev. Rul. 77-85*; nor, aside from this suit, will there be any other judicial review, such as a refund suit, as contemplated by Congress in enacting the Anti-Injunction Act. The rule of *Williams Packing* is that where, as here, the Act does not accomplish its purpose, the Act does not apply. In the present case, application of the Act would accomplish only the grossest injustice.

The Court granted certiorari in *Williams Packing* (370 U.S. at 2) "to determine whether the case came within the scope of this Court's holding in *Nut Margarine*. . . ." Similarly, the Court should grant certiorari here to determine whether the decision of the court of appeals is within the scope of *Williams Packing* and *Bob Jones University*.

B. The Writ Should Be Granted To Determine Whether the Anti-Injunction Act, As Construed By The Court Of Appeals, Is Unconstitutional.

The constitutionality of the Anti-Injunction Act as applied in *Bob Jones University* was saved only by the presence of factors that are absent here. As the Court said:

> ". . . although the congressional restriction to postenforcement review may place an organization . . . in a precarious financial position, the problems presented do not rise to the level of constitutional infirmities, in light of the powerful governmental interests in protecting the administration of the tax system from premature judicial interference [citations omitted] and of the opportunities for review that are available." 416 U.S. at 747-48.

Since neither of the mitigating factors specified by *Bob Jones University* is present here, the problems

with the court of appeals' application of the Anti-Injunction Act do "rise to the level of constitutional infirmities." The governmental interest is non-existent and the denial of judicial review is complete.

So interpreted, the Anti-Injunction Act is constitutionally infirm for three reasons. The Act (1) deprives FIAC and its policyholders of property without due process of law, in violation of the due process clause of the fifth amendment, (2) removes jurisdiction from all courts, in contravention of both the due process clause and of Article III, and (3) results in a delegation of unfettered legislative power to the IRS, in contravention of the due process clause and of the principle of separation of powers.

1. *Deprivation of property without due process of law.* The court of appeals conceded that *Bob Jones University* had left open the question whether a party could be denied all access to judicial review by the Anti-Injunction Act. That court concluded, however, that, whatever might be the case with respect to other would-be litigants, FIAC could be denied all access to the courts because "the injury caused by the shift in IRS's interpretation of the pertinent statute—a detrimental impact on [FIAC's] business—does not invade any property interest cognizable under the due process clause." (Appendix A, *infra*, p. 13a.)

Rev. Rul. 77-85 destroyed FIAC's going business, the value of its capital investment in that business, and the value of its contracts with its policyholders.[11] The

[11] Under FIAC's investment annuity contracts, the policyholders are entitled to make additional annuity purchase contributions before annuity payments commence. However, as a consequence of *Rev. Rul. 77-85*, no such additional contributions have been made since March, 1977. (Appendix A, *infra*, p. 5a.)

court of appeals appeared not to deny that these are property interests within the protection of the due process clause, though it certainly did not focus upon or discuss the nature and magnitude of FIAC's losses. Rather, the court of appeals appeared to make the odd and untenable assertion that property interests are not implicated here because FIAC's deprivation is indirect in that the tax complained of would be assessed against prospective policyholders. Hence, according to the court, the destruction of FIAC's property was not forbidden by the due process clause.[12] But the deprivation FIAC complains of is direct—resulting from the denial to it by the IRS of a statutory right upon which all of its property depended. As the passage quoted in the margin shows, the court of appeals recognized that persons are deprived of a protected property interest when denied a statutory right. This recognition, of course, is solidly grounded in decisions of this Court holding that a person may not be deprived of a statutory entitlement without due process. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970); *Perry* v. *Sindermann,* 408 U.S. 593 (1972). The courts of appeal routinely find protectible interests in circumstances analogous to those here. See, e.g., *Alaska Airlines, Inc.* v. *Civil Aeronautics Board,* 545 F.2d 194, 199-200 (D.C. Cir. 1976).

[12] "The fact that the government threatens to deprive a person of his property (by a tax assessment) may have pecuniary impact on a variety of other persons whose fortunes are in one way or another linked to him—his family, suppliers, prospective donees (e.g., colleges hoping for alumni contributions) and prospective coventurers. In some instances the impact may be sufficient to establish that they are 'adversely affected' or 'aggrieved' for purposes of ordinary doctrine establishing judicial review of agency action. But *unless the persons are deprived of their own property, or a common law or statutory right, there is no basis for a claim that government has 'deprived' them of property.*" (Appendix A, *infra,* p. 14a) (Footnotes omitted.) (Emphasis added.)

That is precisely FIAC's position. FIAC has been deprived of a right to which it is entitled by statute, a right guaranteed not indirectly but directly, and intended by Congress as an entitlement of business organizations like FIAC.

Congress provided in section 801(g) of the Code that "contracts with reserves based on a segregated asset account," as defined in section 801(g)(1)(B), would be treated in the same way as other variable annuities. This treatment includes tax consequences of the insurance company as well as the policyholders. Indeed, some of the IRS's prior rulings were issued directly to FIAC. Moreover, in writing the statutory definition, Congress stated criteria to be met by the sellers of annuities, not by the policyholders. Companies were invited to arrange their affairs so as to meet those criteria. FIAC did so, expending large sums of money in reliance upon the statute. That gives rise to a statutory entitlement.

FIAC's reliance upon the statute was particularly reasonable here in view of the consistent rulings practice of the IRS which for 12 years confirmed FIAC's position. Of course, there is no question that the IRS was free to change its position to that set forth in *Rev. Rul. 77-85.* But, given FIAC's reasonable reliance of this magnitude, it is unthinkable that FIAC may not now reach a court to review the IRS's new position and to obtain its statutory rights.[13]

[13] For purposes of the jurisdictional issue, FIAC is entitled to assume that its interpretation of section 801(g)(1)(B) is correct and that *Rev. Rul. 77-85* is wrong. The issue is whether this suit is barred by the Anti-Injunction Act even if the Ruling is wrong and FIAC is being deprived of its rights under the statute.

The statute could, of course, be changed, but it has not been. The only thing that has changed is the IRS's interpretation of the statute, which denies to FIAC that which the statute gave, has put FIAC out of business and has caused it to suffer large losses. And, nonetheless, the court of appeals took the position that FIAC was not deprived of its property and cannot even have the statute interpreted by a court.

By likening FIAC to others who are indirectly or collaterally injured when a tax is asserted against a third party, the court of appeals, in effect, was resurrecting respondents' standing argument which had been properly rejected by the district court and was not even advanced on appeal. (Appendix A, *infra,* p. 6a, n. 9.) In establishing its standing and its satisfaction of the "zone of interests" test (*Association of Data Processing Service* v. *Camp,* 397 U.S. 150, 153 (1970)), FIAC pointed directly to its reliance on the Code stating:

> "Plaintiffs relied upon the rulings and the provisions of the Internal Revenue Code, as so interpreted, to establish their business. The interests which plaintiffs seek to protect are those granted by the relevant provisions of the Internal Revenue Code as interpreted by the defendants themselves." [Brief in Opposition to Defendants' Motion to Dismiss and in Reply to Defendants' Memorandum, p. 30]

Thus, to say that FIAC has a statutory entitlement which it may vindicate in the courts is not to widen the concept of entitlement or the class of those who may claim entitlement. This was implicit in the recognition

of FIAC's standing to bring this action.[14] It would, in fact, be the merest sophistry to say that a person entitled by law to a welfare check if he meets certain criteria has a statutory entitlement, but that a business organization has none even though it meets the criteria of the Code. The IRS itself recognized FIAC's direct interest created by the Code when it issued rulings to FIAC. This case is precisely the same as if Congress had required a license to sell investment annuities, specified the criteria of eligibility, FIAC had met the criteria and had invested large sums only to have the IRS revoke its license. FIAC certainly would have a due process right to challenge such a revocation in court. It can have no less access to a court when the IRS redefines a tax statute in such a way as to put FIAC out of business.

2. *Removal of jurisdiction from all federal and state courts.* The court of appeals has interpreted the Anti-Injunction Act in a manner that raises the vexed issue of Congress' ultimate power to remove jurisdiction from all federal courts and all state courts. The court of appeals' decision necessarily embodies the principle that Congress may enact a statute, empower an executive agency to apply it, and then deny jurisdiction to all courts to interpret that statute at the request of persons injured and coerced by its application.

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[14] Nor should there be any concern about the "evisceration" of the Anti-Injunction Act or any impairment of the tax collection process, as respondents contended below, if those few litigants in FIAC's situation are able to pursue their statutory rights in court. As the District of Columbia Circuit observed in *"Americans United" Inc.* v. *Walters,* 477 F.2d 1169, 1180 (1973)—

> ". . . the proverbial 'floodgates' to judicial review of Internal Revenue Service action will remain closed."

This is a power beyond even that suggested by the broad language of *Sheldon* v. *Sill*, 8 How. 441, 12 L.Ed. 1147 (1851), and *Ex parte McCardle*, 7 Wall. 506, 19 L.Ed. 264 (1869). Even those who think that Congress ultimately has complete control over all jurisdiction of the federal courts, other than the original jurisdiction of this Court, have thought that state court jurisdistion must remain as the safeguard. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953). And there are cases holding that Congress may not remove jurisdiction, even as to the lower courts, when to do so would result in a denial of due process. *Battaglia* v. *General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948).

This would be a serious problem, amounting perhaps to the stature of a constitutional crisis, if Congress had deliberately attempted the result the court of appeals reached. The answer of course is that Congress attempted no such thing. In adopting the Anti-Injunction Act, Congress intended to leave open the suit for a refund and assumed it would always be available. In such circumstances, there is no occasion to address the ultimate question of congressional power over federal and state court jurisdiction. This Court has more than once interpreted statutes so as to avoid that question. *Weinberger* v. *Salfi, supra; Johnson* v. *Robison*, 415 U.S. 361 (1974); and *Califano* v. *Sanders*, 430 U.S. 99 (1977). Where, as here, there is no opportunity for a refund suit or any other judicial review, the Anti-Injunction Act should simply be interpreted not to bar a suit for an injunction.

3. *Unlimited delegation of legislative powers.* If Congress may prevent affected persons from testing an

interpretive ruling of the IRS in court, it has the power to delegate complete and unrestrained law-making power to any agency. That no such delegation was intended here does not alter the principle adopted. This Court has been unwilling to accept delegations so broad and so unguided. *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 340-42 (1974); *Oestereich* v. *Selective Service System Local Board No. 11, Cheyenne, Wyoming*, 393 U.S. 233, 236-38 (1968). These cases gave limiting construction to broad statutes in order to avoid unstructured delegations. Older cases, of course, have declared statutes unconstitutional because of overly broad delegations. *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935).

It is clear, of course, that the IRS's authority to make rulings is not a power to make law, but merely an authority to interpret the Code. *Dixon* v. *United States*, 381 U.S. 68, 73 (1965); *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134-35 (1936).[15]

This case, therefore, illustrates the danger described by Mr. Justice Blackmun in *Commissioner* v. *"Americans United" Inc.*, 416 U.S. 752, 763 (1974). He wrote

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[15] The potential for abuse in delegating such lawmaking power to an agency is already evident in this case. As the district court noted, the IRS exceeded its proper authority in issuing *Rev. Rul. 77-85*. Instead of interpreting the Code, the Ruling amends the statute on the basis of legislative concerns about tax reform. (Appendix B, *infra*, p. 56a-58a.) FIAC is prepared to defend this conclusion of the district court if this Court decides that jurisdiction exists and the merits of *Rev. Rul. 77-85* are subjected to further judicial review.

in dissent that he was "disturbingly aware of the overwhelming power of the Internal Revenue Service," and felt the need to express a "word of caution about governmental power where the means to challenge that power are unfavorable and unsatisfactory at best." If that was true in a case where alternative routes to judicial review were available, it is undeniable in a case where respondents claim, and the court of appeals has held, that no avenue of judicial review exists.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 19, 1980

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Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1106

INVESTMENT ANNUITY, INC., *et al.*

v.

W. MICHAEL BLUMENTHAL AS SECRETARY OF THE TREASURY OF THE UNITED STATES, *et al.*,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 77-0810)

Argued February 14, 1979

Decided October 5, 1979

Richard Farber, Attorney, Department of Justice, with whom *M. Carr Ferguson*, Assistant Attorney General, *Gilbert E. Andrews* and *Leonard J. Henzke, Jr.*,

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Attorneys, Department of Justice, were on the brief for appellants, of counsel Earl J. Silbert, United States Attorney.

William L. Goldman, with whom *Herbert L. Awe* was on the brief for appellee First Investment Annuity Company of America.

Arthur P. Hartel, Jr. was on the brief for appellee Investment Annuity, Inc.

Before WRIGHT, *Chief Judge*, and MCGOWAN and LEVENTHAL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

LEVENTHAL, *Circuit Judge*: The Internal Revenue Service (IRS) appeals orders of the district court that granted to marketers of investment annuities a judgment declaring erroneous the statutory interpretation contained in Revenue Ruling 77-85 [1] and enjoining IRS from applying it to purchasers of investment annuities. Because we find that the Anti-Injunction Act [2] and the tax exception to the Declaratory Judgment Act [3] bar the relief awarded by the district court, we reverse.[4]

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[1] Revenue Ruling 77-85 reversed, prospectively, the prior administrative practice of IRS according favorable tax treatment to purchasers of "investment annuities." 1977-1 Comm. Bul. 12.

[2] Internal Revenue Code of 1954, § 7421(a), 26 U.S.C. § 7421(a) (1976).

[3] 28 U.S.C. § 2201 (1976).

[4] We therefore reach no decision on the merits, except as necessary to dispose of one exception to the Anti-Injunction Act.

I. BACKGROUND

The purchaser (or policyholder) of an annuity buys from an insurance company the right to receive periodic payments beginning at a specified date (often the purchaser's anticipated retirement age) and continuing as long as the policyholder lives. Under a fixed dollar annuity, the policyholder receives a sum certain. Under a variable annuity, the amount of payment varies depending on the investment performance of assets held in a "segregated asset account" rather than in the insurance company's general asset account. A form of variable annuity, the investment annuity's salient characteristics, and the ones that occasion the instant controversy, are (1) provision for substantial direction by the policyholder over the investment of assets contained in the segregated account or "custodial account," and (2) its guarantee of liquidity.[5]

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[5] More specifically, the investment annuity operates as follows. An investment annuity contract establishes a "custodial account" with a third party, usually a bank, into which the policyholder pays a minimum amount (in cash or by the transfer of other assets) that he may supplement at any time up to the "starting date" of the annuity. The assets in the account are nominally the property of the insurance company, as they are pledged to the purchase of an annuity. The company also receives a percentage of the assets annually as a premium on an annuity policy, and any assets remaining in the account at the policyholder's death as a "terminal premium." The assets in the account are invested at the direction of the policyholder. While investment options are limited to those on an "approved list," such lists normally include publicly-traded securities, government obligations, certificates of deposit, savings accounts, commercial paper, and life insurance. The policyholder may at any time direct the custodian to sell, purchase or exchange assets held in the account, and to reinvest income. The policyholder also retains the power to direct the voting of the securities or to exercise any other rights pertaining to the assets. While the assets contained in the custodial account may not be returned

The substantive issue presented is whether investment annuities are "contracts with reserves based on a segregated asset account" within the meaning of section 801(g)(1)(B) of the Internal Revenue Code.[6] If they are, income generated by the assets held in the custodial account is taxed to the insurance company at the nominal rates applicable to them. If they are not, the income is currently taxable to the policyholder.

Beginning in 1965, IRS, in a series of private letter rulings directed to individual policyholders and to appellees,[7] took the position that income generated by the assets held in custodial accounts was taxable to the insurance company, not the policyholder. The theory was that the company, not the policyholder, "owed" the assets. Sales of the contracts, initially modest, mushroomed when business and financial publications heralded them as permitting taxpayers to avoid taxation on investment earnings while retaining control and liquidity.[8] IRS under-

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directly to the policyholder, full or partial redemption of the annuity policy may be had prior to the starting date. In such a case, the custodian sells the assets and pays the proceeds over to the insurance company, which in turn pays them to the policyholder, less any cash surrender charges. Should the policyholder die before the starting date, the custodial account is liquidated and the proceeds paid to the policyholder's beneficiaries in the same manner. J.A. at 139-142.

[6] 26 U.S.C. § 801(g)(b) (1976).

[7] Appellee Investment Annuity, Inc.'s only business was the ownership of the shares of First Investment Annuity Company of America (FIAC), which engaged solely in the sale of investment of annuities. Following the government's notice of appeal, Investment Annuity sold FIAC to INA Corporation. Except where otherwise noted, we refer collectively to "appellees."

[8] The advantages were twofold. First, because income from assets held by insurance companies is subject to only nominal taxation, the overall after-tax return on the investment

took a reconsideration of its position, eventually reversing it in Revenue Ruling 77-85. IRS concluded that retention of substantial incidents of ownership made the policyholder the "owner" of the assets for tax purposes, thereby removing the investment annuity from section 801(g)(1)(B) and making the income currently taxable to the policyholder. In view of policyholders' reliance on IRS's earlier determinations, however, IRS "grandfathered" existing contracts, applying its ruling only to new accounts or to existing accounts to which a contribution was made after March 9, 1977.

In conjunction with the IRS ruling, state regulatory authorities and the Securities and Exchange Commission (SEC) rescinded their earlier, favorable determinations on the investment annuities marketed by appellees. This effectively prohibited further marketing by appellees, and no investment annuities have been sold by appellees, nor have additional contributions to existing accounts been made, since March 9, 1977.

After failing in a bid for congressional intervention, appellees brought this action, seeking declaratory and injunctive relief. The government moved to dismiss on the ground that the Anti-Injunction Act and the tax exemption to the Declaratory Judgment Act deprived

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(though offset somewhat by fees to the custodian and insurance company) would, as a result of compounding, be significantly greater than if currently taxed to the policyholder. Second, realization of the income was deferred to a time (*e.g.*, after retirement) when the policyholder would likely occupy a lower tax bracket. These advantages, combined with the retained control over the investment, prompted the financial press to dub the investment annuity the "wrap-around" annuity, because it permitted investors to defer current income merely by "wrapping" an annuity around an existing investment.

the district court of jurisdiction.[9] Appellees countered that because IRS had "grandfathered" existing contracts and because further sales were infeasible, the legality of the IRS's ruling would otherwise escape judicial review, as there would be no opportunity to test in a taxpayer suit for refund.

The District Court agreed with appellees that the pertinent provisions were not "intended to preclude preenforcement review of Service actions where the action will otherwise *never* be subject to judicial review." J.A. at 175. However, in an order of July 12, 1977, the district court initially refused to maintain the action until appellees demonstrated that they had made "all good-faith efforts to stage a 'friendly' third-party challenge to Revenue Ruling 77-85." *Id.* at 173. The court anticipated the sale of one more investment annuity to a cooperative taxpayer, who could then challenge Revenue Ruling 77-85 in a refund suit. When the state authorities and the SEC declined to accede to this procedure by approving such a sale, the district court, on September 28, 1977, held that no third party investment was feasible and denied the government's motion to dismiss. On November 9, 1977, the court issued a memorandum opinion and order declaring Revenue Ruling 77-85 invalid, and subsequently entered further relief, enjoining the government from applying the ruling to the extent it would increase the tax liability of investment annuity purchasers.[10]

[9] The district court rejected the government's claim of lack of standing, and the government has not pursued the point on appeal.

[10] Appellees also sought an injunction requiring that, even if the government prevailed on appeal, it would nevertheless be required to afford favorable treatment to income arising from contributions made after March 9, 1977 and before resolution of the appeal. When the district court failed to provide such relief in its order of November 9, 1977, appellees filed a motion to it in this court. It was denied on December 9, 1977. The district court's order of December 8, 1977, expressly provided for retroactive assessment of taxes in the event of a successful appeal by the government.

II. Analysis

We do not pass on the merits of apellees' claim, for we conclude that this action is barred by the Anti-Injunction Act and the tax exemption to the Declaratory Judgment Act. The Anti-Injunction Act provides unequivocally:

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax is assessed.[11]

The language of the Declaratory Judgment Act exempting all suits "with respect to federal taxes" [12] is, if anything, more restrictive. However, since we have held that the reach of the two Acts is coterminous,[13] our analysis focuses on the Anti-Injunction Act.

At the outset, we reject appellees' contention that the Anti-Injunction Act does not apply because this is not a "suit for the purpose of *restraining* the assessment or collection of any tax." Their theory is that there is no interference with the collection of revenue: apepllees'

[11] Internal Revenue Code of 1954, § 7421(a), 26 U.S.C. § 7421(a) (1976). The section does contain certain express exceptions, not here relevant.

[12] 28 U.S.C. § 2201 (1976).

[13] Eastern Ken. Welfare Rights Org. v. Simon, 165 U.S. App.D.C. 239, 244-46, 506 F.2d 1278, 1283-85 (1974), *rev'd on other grounds*, 426 U.S. 26 (1976); "Americans United" Inc. v. Walters, 155 U.S.App.D.C. 284, 290-91, 477 F.2d 1169, 1175-76 (1973), *rev'd on other grounds*, 416 U.S. 752 (1974); *accord*, McGlotten v. Connally, 338 F. Supp. 448, 452-53 (D.D.C. 1972) (three-judge court).

tax liability will increase as the income from the property held in the segregated accounts is attributed to them; present policyholders have been "grandfathered;" and no further sales of investment annuities have occurred since IRS's March 9, 1977, ruling. However, appellees' theory is undercut by their own action in seeking, and obtaining, relief in the form of an injunction against taxing policyholders on the income from investment annuity accounts. That the suit has had no current effect on the collection of taxes is of no import, for its "purpose" is clearly restraint. If appellees were to prevail in this court, they surely would reinstitute sales of investment annuities. In that event, the district court's order would operate to prevent IRS from assessing and collecting taxes called for by Revenue Ruling 77-85.[14]

In recent years, Supreme Court decisions examining the Anti-Injunction Act have drummed its central purpose: to protect the government's ability to assess and collect taxes free from pre-enforcement judicial interference by confined taxpayers seeking review to refund actions.[15] To this end, the Court has given the Act "al-

[14] Appellees rely on Eastern Ken. Welfare Rights Org. v. Simon, 165 U.S.App.D.C. 239, 245, 506 F.2d 1278, 1284 (1974), *rev'd on other grounds*, 426 U.S. 26 (1976), and McGlotten v. Connally, 338 F. Supp. 448, 453-54 (D.D.C. 1972) (three-judge court). Those cases are easily distinguishable. In them, the plaintiffs sought to compel IRS to rescind tax-exempt status accorded certain organizations. Because the government would have been required to levy taxes on previously tax-exempt organizations, it was held that the Anti-Injunction Act did not apply. The effect of the decree was to increase the amount of taxes payable. The effect of the decree sought and obtained by appellees was to reduce the total amount of taxes payable, and was plainly a direct restraint on the government's ability to collect taxes.

[15] Bob Jones University v. Simon, 416 U.S. 725, 736-37 (1974); Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 7 (1962). The Court has also identified a "collateral objective

most literal effect," [16] without regard to the harshness of the result.

In *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), the court concluded that the Act permitted relief from its strictures *only* where (1) the government could "under no circumstances" ultimately prevail, and (2) where equity jurisdiction was otherwise present. *Id.* at 7. A claim that irreparable injury would result from the collection of the tax was not sufficient to overcome the Act's prohibition, since such a showing, necessary to invocation of equity jurisdiction, satisfied only one prong of the test. Thus, the Court was unmoved by the claim that the challenged collection of taxes could bankrupt it.

In *Bob Jones University v. Simon*, 416 U.S. 725 (1974), the Court rejected a contention that there were judicially-created exceptions to the Act other than the "under no circumstances" test. *Williams Packing*, the Court stressed,

> was meant to be the capstone to judicial construction of the Act. It spells an end to a cyclical pattern of allegiance to the plain meaning of the Act, followed by periods of uncertainty caused by a judicial departure from that meaning, and followed in turn by the Court's redisclosing of the Act's purpose.

Id. at 742. In *Bob Jones University* and a companion case, *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), charitable organizations had sought to contest the revocation of their tax-exempt status prior to the assessment of taxes against them. Though recognizing that the denial of tax-exempt status threatened the flow

of the Act—protection of the collector from litigation pending a suit for refund." *Williams Packing, supra*, at 7-8 (quoted in *Bob Jones University, supra*, at 737); *see also* Commissioner v. Shapiro, 424 U.S. 614, 628-29 (1976).

[16] Bob Jones University v. Simon, 416 U.S. 725, 737 (1974).

of contributions to the charities, the Court declined to depart from the dual test of *Williams Packing*.

In the instant case, appellees did not seek to persuade the district court that their case came within the *Williams Packing* exception. J.A. at 174. While appellee Investment Annuity, Inc., makes that contention on appeal, it has failed to meet its burden of demonstrating that, at the time suit was commenced, the government could "under no circumstances" ultimately prevail. This is not a case in which IRS flouted the express terms of the Code,[17] or lacked any factual basis for the assessment of taxes against an individual taxpayer.[18] Rather, the propriety of IRS's treatment of investment annuities was "sufficiently debatable" to preclude the showing of certain success requisite to invocation of the *Williams Packing* exception.

The principal contention of the appellees is that an exception to the Anti-Injunction Act exists where the practical effect of applying the Act would be to foreclose all judicial review of the challenged action. The district court agreed. Finding that no person could raise the validity of Revenue Ruling 77-85 in a refund suit, the district court held that the Act did not apply and proceeded to reach the merits.

Appellees, and the district court, draw their inspiration from dictum in *Bob Jones University, supra.* The Supreme Court did state: "This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different." 416 U.S. at 747. The government counters appellees' thesis by arguing that *United States v. American Friends Service Committee*, 419 U.S. 7 (1974), stands for the proposition that the Anti-Injunction Act bars a tax suit even where an aggrieved party is, by operation of the Act, denied all access to judicial review.

[17] *E.g.*, Miller v. Standard Nut Margarine Co., 284 U.S. 498 (1932); *see* Bob Jones University v. Simon, 416 U.S. 725, 744-46, Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 7 (1962).

[18] *See* Commissioner v. Shapiro, 424 U.S. 614, 624-28 (1976).

While Justice Douglas' dissent in *American Friends*, 419 U.S. at 14 n.3, did accuse the majority of deciding *sub silentio* the issue left open by the dictum in *Bob Jones University*, the majority evidently did not view the case as one in which plaintiffs were denied access to judicial review. The Court emphasized that ". . . the employees will have 'full opportunity to litigate' their tax liability in a refund suit." 419 U.S. at 11 (citation omitted). In view of the Court's different perception, we reject the government's argument that *American Friends* resolves the question left open in *Bob Jones University.*

Read broadly, however, *American Friends* does reinforce the message of *Williams Packing* and its progeny that the Act's bar is not lightly to be overcome. The clear meaning of *Bob Jones University's* reference to *Williams Packing* as the "capstone" of judicial construction under the Act is that *Williams Packing* defines the sole basis for judicially-created exceptions to the Act. As a result, we cannot agree with appellees and the district court that the Act and the pertinent precedents countenance a general exception *wherever* a matter will otherwise escape judicial review.[19]

[19] Eastern Ken. Welfare Rights Org. v. Simon, 165 U.S. App.D.C. 239, 506 F.2d 1278 (1974), *rev'd on other grounds*, 426 U.S. 26 (1976), does not preclude our result. The court there did rely on the lack of an "adequate legal remedy" to find that the Act did not apply. *Id.* at 245. But the basis of our holding in that case was that because the action was, in effect, one to require the collection of taxes by removing the

Nevertheless, the Act must yield when the denial of judicial review rises to the level of a constitutional infirmity. This narrower "exception," not judicially inferred from the statute, but having constitutional roots, may be the implication of the *Bob Jones University* decision. While the Court barred the further fashioning of statutory exceptions, it did not deny the relevance of due process concerns. The Court's reference to "a case in which an aggrieved party has no access at all to judicial review" came in the context of its discussion of the University's claim that postponement of its challenge to the revocation of its tax-exempt status would violate due process. As to this claim, the Court held that the "problems presented do not rise to the level of constitutional infirmities, in light of the powerful governmental interests in protecting the administration of the tax system from premature judicial interference." 416 U.S. at 747. We take the Court's dictum as a recognition that the denial of all access to judicial review, as opposed to its postponement, might rise to the level of a constitutional infirmity. But in this, the Court merely reflected established doctrine that a taxpayer may not, consistently with due process, be denied the opportunity for an ultimate judicial determination of the legality of a tax assessment against him.[20] Congress may in some cases restrict judicial review of administrative action, even though the results may have a detrimental impact on their subjects.[21] And, it is clear that not all denials of

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tax-exempt status of certain organizations, the suit fell outside the Act altogether. *See* note 14 *supra*.

[20] Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931) (Brandeis, J.) ("Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate.").

[21] *E.g.*, Southern Ry. Co. v. Seaboard Allied Milling Co., 47 U.S.L.W. 4701 (U.S. June 11, 1979) (ICC decisions not

access to judicial review amount to due process violations.[22]

In view of the unambiguous language of the Act, and the Supreme Court's strict interpretation, any "exception" to the Act necessary to conform it to constitutional standards must be carefully tailored to achieve that end while preserving to the maximum extent the statutory purpose. The Court's recognition in *Bob Jones University* that the complete denial of access to judicial review may implicate due process concerns provides no basis for crafting an exception in a case where the denial does not amount to a violation of due process.

Here, the injury caused by the shift in IRS's interpretation of the pertinent statute—a detrimental impact on appellees' business—does not invade any property interest cognizable under the due process clause. The challenged government action concerned the tax liability of investment annuity purchasers; it did not require appellees to pay taxes and hence there was no government action that directly deprived them of property. Deprivation of property underlies the long-recognized right of taxpayer to judicial review of the assessment of taxes.[23] Nor did the earlier private letter rulings on which appellees relied in building their business create

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to investigate proposed rates); Arrow Transp. Co. v. Southern Ry. Co., 372 U.S. 658 (1963) (ICC suspension decisions).

[22] *E.g.*, DeRodulfa v. United States, 149 U.S.App.D.C. 154, 170-72, 461 F.2d 1240, 1256-68, *cert. denied*, 409 U.S. 949 (1972) (veterans' benefits).

[23] In Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931) (quoted in note 20 *supra*), the reference to taxpayer's ultimate opportunity for judicial review is in the context that "property rights are involved."

any "legitimate claim of entitlement." [24] Such rulings express the Commission's interpretation of the law at the time they are given, and may be taken into account subsequently, but they do not have the force of law and do not bind the Commissioner to adhere to the same position in the future.[25]

The fact that the government threatens to deprive a person of his property (by a tax assessment) may have pecuniary impact on a variety of other persons whose fortunes are in one way or another linked to him—his family, suppliers, prospective donees (*e.g.* colleges hoping for alumni contributions) and prospective coventurers. In some instances the impact may be sufficient to establish that they are "adversely affected" or "aggrieved" for purposes of ordinary doctrine establishing judicial review of agency action.[26] But unless the persons are deprived of their own property, or a common law or statutory right, there is no basis for a claim that government has "deprived" them of property.[27]

Our opinion assumes that the district court was correct in its premise, not challenged here, that no alternative methods of judicial review were available. Whether

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[24] Board of Regents v. Roth, 408 U.S. 564, 577 (1972); *see also* Bishop v. Wood, 426 U.S. 341 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974).

[25] *See* Dixon v. United States, 381 U.S. 68 (1965); Automobile Club of Michigan v. Commissioner, 353 U.S. 180 (1957); Wisconsin Nipple & Fabricating Corp. v. Commissioner, 581 F.2d 1235 (7th Cir. 1978).

[26] 5 U.S.C. § 702 (1976).

[27] Roth v. Board of Regents, 408 U.S. 564 (1974); Perry v. Sinderman, 408 U.S. 593 (1972).

or not this premise stands,[28] the court is without jurisdiction to provide the relief sought or granted.

Though this case involves the special statutory provisions relating to tax, a useful perspective is provided by considering it in the more general context of judicial review of agency activity. The "generous" provisions of the Administrative Procedure Act for judicial review [29] have been held to embody a presumption in favor of judicial review that extends—assuming hardship, ripeness and suitability for judicial resolution—even to preenforcement actions for injunction or declaratory judgment.[30]

The presumption of reviewability of administrative action is subject to exceptions: "except to the extent that —(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." There are only a handful of instances where a statute has expressly precluded judicial review,[31] although on occasion

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[28] The Pennsylvania Insurance Commissioner refused to approve an additional sale or contribution, even for the purpose of permitting a test case. The SEC declined to issue a "no-action" letter in view of the Insurance Commissioner's action. But the Commissioner's decision was premised on an evaluation that the public interest would best be served by a speedy resolution in the district court. In light of our ruling, the Commissioner may choose to modify his assessment and allow a test case to proceed.

[29] *See e.g.*, 5 U.S.C. §§ 701, 702 and 706.

[30] Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967); Curran v. Laird, 136 U.S.App.D.C. 280, 420 F.2d 122 (1969) (en banc).

[31] *E.g.* the prohibition of judicial review when the I.C.C. has refused to exercise its statutory authority to suspend a rate change for a limited time. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Arrow Transportation v. Southern Railway Co., 372 U.S. 658 (1963).

the Court has discerned an implied statutory preclusion of review.[32] The exemption for "action committed to agency discretion by law" has been construed narrowly—for cases where there is no law to apply[33] or for extraordinary circumstances, such as those requiring flexibility in managing the resources of national defense.[34]

In the tax field there is quintessentially law to apply, and no claim of total withdrawal of issues from judicial review. There are, however, important statutory limitations. Perhaps the extreme case was put by the provision that where there is reason to believe that the assessment or collection of taxes might be endangered by delay, the Commissioner of Internal Revenue may, pursuant to statutory authority and without fear of judicial disapproval, make an immediate jeopardy assessment and

[32] *See e.g.*, Switchmen's Union of North American v. National Mediation Board, 320 U.S. 297 (1943), wherein the Court discerned a Congressional intent to make agency certification of a collective bargaining representative "the last terminal point," with "no dragging out of the controversy into other tribunals of law." 320 U.S. at 305. While the *Switchmen's* Court made much of the fact that the agency was doing nothing more than making a finding of fact and that it was not issuing a directive, the statute itself contained the directive; thus, the "finding of fact" was virtually conclusive as to outcome. Nonetheless, even in this context, the Court was unwilling to review agency action where it detected an intent of Congress to preclude such review.

[33] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

[34] Curran v. Laird, 136 U.S.App.D.C. 280, 420 F.2d 122 (1969). The courts will not examine the agency's action in this "narrow band of matters that are wholly committed to official discretion, and that the inappropriateness or even mischief involved in appraising a claim of error or abuse of discretion, and testing it in an evidentiary hearing, leads to the conclusion that there has been withdrawn from the judicial ambit any consideration of whether the official is arbitrary or constitutes an abuse of discretion. . . ." *Id.*

require the taxpayer to forward payment or post a bond.[35] This is evocative of the special problems posed by statutory provisions for the summary seizure, condemnation, and destruction of unwholesome food.[36]

Apart from such extreme instances, the tax field is marked by the general preclusion of advance declaratory or injunctive relief.[37] Even here, the Court has interposed judicial provenance for cases where the agency strays palpably off the track. This is very like what it has done for cases where judicial review was entirely prohibited,[38] and it identifies a special enclave in administrative law that hearkens to mandamus and the power to enforce "ministerial" duties in case of "clear error." But such review is reserved for cases "so plainly

[35] Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 595 & 596 n.6 (1930).

[36] North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908). The Court stated that the ex parte decision of the health officer might be challenged in a subsequent action for damages.

See also Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (seizure of mislabeled vitamins).

[37] The Anti-Injunction Act and the tax exception to the Declaratory Judgment Act discussed above are just two examples of statutory preclusions in the tax field. *See also* Phillips v. Commissioner of Internal Revenue, 283 U.S. 589 (1930).

[38] In this sense, *Switchmen's, supra* note 6, has been comprised by Leedom v. Kyne, 358 U.S. 184, 188 (1958) (permitting a district court action contesting an NLRB certification determination): "This suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather, it is one to strike down an order of the Board made in excess of its delegated powers. . . ."

beyond the bounds. . . . as to warrant the immediate intervention of an equity court." [39]

The court respects the need not to interrupt the flow into the public trove of the tax dollars that are the life-blood of the national government. A "peek at the merits" may guide the the judge in determining whether there is available the judisdiction for clear deviations from legislative instruction,[40] for "[t]he reconciliation of doctrine lies not in concept but in practicalities." [41]

For most tax issues and most taxpayers, a subsequent action for refund adequately safeguards all appropriate concerns.[42] The problem posed to plaintiffs/appellees is that they do not have sole control over their prospective cause of action.[43] The state regulatory authorities and the Securities and Exchange Commission must cooperate by reinstating their earlier favorable determination on the investment annuities marketed by appellees if the cause of action is to materialize. In this important respect, the appellees share the management of their business with the government.

This is not a situation where there are no remedies, however. Congress keeps a watchful eye on developments in the tax field, and will listen to citizens with a grievance or plea. It is not necessary for Congress to effect

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[39] Local 130, Int'l Union of Elec., Radio & Machine Workers v. McCulloch, 120 U.S.App.D.C. 196, 201, 345 F.2d 90, 95 (1965).

[40] *Cf.* International Bhd. of Team. v. Brotherhood of Rail., A.&S. Cl., 131 U.S.App.D.C. 55, 64, 402 F.2d 196, 205 (1968).

[41] *Id.*

[42] Phillips v. Commissioner, 283 U.S. 589, 595 (1930).

[43] Appellees' problem in this regard is not unique. It might be compared, for instance, to the plight of a party to a proposed corporate reorganization whose partner does not wish to proceed. *See e.g.* Price v. Gurney, 324 U.S. 100, 107 (1944).

a substantive change in the law. It might, if so disposed, provide the appellees and similarly situated parties with a remedy. Thus the Revenue Act of 1978 made declaratory judgment available to prospective issuers of certain governmental obligations.[44] Such issuers previously had found themselves in the same position in which the appellees find themselves now. Section 7478 was added to the Code to give the issuers an action for a declaration as to the status of the prospective obligations.[45]

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[44] Internal Revenue Amendments, Pub. L. No. 95-600, § 7478, 92 Stat. 2841, 2841-42 (1978) (codified in I.R.C. § 7478).

[45] The legislative history of § 7478 illuminates the relationship of the "aggrieved" parties in the two cases the Senate Finance Committee reported in that case:

> As a practical matter, there is no effective appeal from a Service private letter ruling (or failure to issue a private letter ruling) that a proposed issue of municipal bonds is taxable. In those cases, although there may be a real controversy between a State or local government and the Service, present law does not allow the State or local government to go to court. The controversy can be resolved only if the bonds are issued, a bondholder excludes interest on the bonds from income, the exclusion is disallowed, and the Service asserts a deficiency in its statutory notice of deficiency. This uncertainty coupled with the threat of the ultimate loss of the exclusion, invariably makes it impossible to market the bonds. In addition, it is impossible for a State or local government to question the Service rulings and regulations directly.
>
> The committee believes that a State or local government should have a right to court adjudication in the situation described above. The bill deals with the problem by providing that, in the event of an unfavorable private letter ruling (or failure to issue a ruling), the State or local government may ask the Tax Court . . . for a declaratory judgment as to the tax status of a proposed issue of municipal bonds.
>
> S. Rep. No. 95-1263, 95th Cong., 2nd Sess., at 533-34 (1978).

So far as judicial remedies are concerned, however, in the absence of constitutional impediment, and we see none, this court must respect the limits placed by Congress on its jurisdiction.

The orders of the district court are reversed, and the case is remanded with instructions to dismiss the complaint for lack of jurisdiction.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 77-810

INVESTMENT ANNUITY, INC., et al., *Plaintiffs,*

v.

W. MICHAEL BLUMENTHAL, et al., *Defendants.*

APPEARANCES: *For the Plaintiffs:* Herbert L. Awe, Esq., William L. Goldman, Esq., Joseph B. Levin, Esq. *For the Defendants:* Donald J. Gavin, Esq., John M. Cunningham, Esq.

Memorandum Opinion of United States District Judge Charles R. Richey

Filed July 12, 1977

This case came before the Court on June 17, 1977, for oral argument on defendants' motion to dismiss and plaintiffs' motion for preliminary injunction. After hearing oral argument, the Court denied defendants' motion to dismiss, but took under advisement plaintiffs' motion for preliminary injunction. While the Court had plaintiffs' motion under advisement, the parties, on June 27, 1977, stipulated that no material facts were in dispute and that a final disposition of the case on the merits would be appropriate.

Upon reconsideration of its June 17, 1977 ruling from the bench, which denied defendants' motion to dismiss, the Court has concluded, for the reasons stated herein, that a ruling on the motion to dismiss should be deferred pending good-faith efforts by the plaintiffs to stage a "friendly" third-party challenge to Revenue Ruling 77-85 by way of either a Tax Court or a refund suit.

I. Background

This case concerns the tax treatment to be accorded to what have been termed *investment annuity contracts*. Specifically, the legal issue before the Court is whether investment annuity contracts are "contracts with reserves based on a segregated asset account" within the meaning of section 801(g)(1)(B) of the Internal Revenue Code, 26 U.S.C. § 801(g)(1)(B).

An investment annuity contract is like a conventional annuity contract in that both involve the purchase by the policyholder of a promise by the insurer to make payments to the annuitant at a specified maturity date (often the annuitant's date of retirement). As in the case of all annuities, the investment annuity is predicated on actuarily-derived mortality and expense guaranties made to the policyholder by the insurance company. An investment annuity is like a variable annuity (and unlike a fixed-dollar annuity) in that the amount of the annuities paid on or after the maturity date reflect the investment return and market value of the "segregated asset account." The unique feature of an investment annuity contract—and the only substantive difference between it and other variable annuity arrangements—is that a separate "segregated asset account," known as a "custodial account," is established for each investment annuity contract, and the policyholder (rather than the insurance company) directs how the assets in the custodial account are to be invested.[1]

This case arises out of the action of the Internal Revenue Service (IRS) in issuing Revenue Ruling 77-85 on March 9, 1977. Internal Revenue Bulletin No. 1977-15, at 7-9 (April 11, 1977). Prior to that date, and since 1965,[2] the IRS had

[1] The "custodial account" is so-called because it is administered by a third-party custodian, generally a bank selected by the policyholder.

[2] The first letter ruling on the tax treatment to be accorded investment annuity contracts is dated August 10, 1965. (Exhibit B, Letter from John W. S. Littleton, Director, Income Tax Division, to John A. Cardon). Subsequent letter rulings consistent with this 1965 ruling were issued on November 8, 1965 (Exhibit C), November 29, 1967 (Exhibit D), and April 25, 1972 (Exhibit E).

On October 20, 1976, the Service announced in News Release IR-1679 that it was reconsidering the tax treatment accorded investment annuity contracts.

treated investment annuity contracts as conventional segregated asset annuity accounts with the result that they were entitled to the favorable tax treatment afforded by section 801(g)(1)(B). In brief, the tax advantages of such treatment are: (1) the annual investment return of the segregated asset account is included not in the policyholder's gross income, but rather in the investment yield of the insurance company, *see* 26 U.S.C. § 804(c), with the result that such investment return is taxed to the insurance company at a "favorable" rate; and (2) when the annuities are paid upon maturity, the gain reflected in the annuity payments, *see* 26 U.S.C. §§ 72(a)-(c), is then included in the annuitant's gross income.[3] Revenue Ruling 77-85 reversed the previous determination by the IRS and held that investment annuity contracts are *not* "contracts with reserves based on a segregated asset account" within the meaning of section 801(g)(1)(B). The effect of this ruling is that all income produced by the assets in the custodial account are includible in the gross income of the policyholder for the year in which they become added to the custodial account. The Ruling did, however, "grandfather" all existing investment annuity contracts by holding that all such contracts will continue to be treated for tax purposes as "contracts with reserves based on segregated asset accounts" within the meaning of section 801(g)(1)(B).

Plaintiffs herein are Investment Annuity, Inc. (IA) and First Investment Annuity Co. (FIAC). FIAC is a wholly-

[3] An annuitant will benefit from such "deferred" tax treatment if, when the annuity is paid, the annuitant has less taxable income (and is thus in a lower tax bracket) than he has in the year(s) the investment yields profits.

owned subsidiary of IA and is IA's sole business. FIAC is licensed in Pennsylvania as a legal reserve life insurance company and was organized for the purpose of issuing and marketing investment annuities of various types. Upon being advised of the substance of Revenue Ruling 77-85, as well as actions taken by the Securities and Exchange Commission and the Insurance Commissioner of the Commonwealth of Pennsylvania in anticipation of the Ruling,[4] plaintiff FIAC immediately ceased selling investment annuity contracts. It has not, since March 9, 1977, sold any new investment annuity contracts, nor has it received any additional contributions to existing accounts. Plaintiffs now seek a declaratory judgment that Revenue Ruling 77-85 is unlawful, beyond statutory authority, and in violation of the Internal Revenue Code. In addition, they seek injunctive relief to restrain the defendants from implementing Revenue Ruling 77-85 and from refusing to treat investment annuity contracts as within the purview of section 801(g)(1)(B).

II. Defendants' Motion to Dismiss

As a threshold matter, defendants have moved to dismiss this case on the ground that the action is barred in its entirety by the Anti-Injunction Act, 26 U.S.C. § 7421(a).[5]

[4]FIAC had been selling its investment annuity contracts in reliance on a no-action letter issued by the Securities and Exchange Commission. On March 7, 1977, the SEC, in anticipation of Revenue Ruling 77-85, rescinded its no-action assurance. Also in anticipation of Revenue Ruling 77-85, the Insurance Commissioner of the Commonwealth of Pennsylvania, on March 8, 1977, notified FIAC that no further sales of investment annuity contracts could be made without his prior approval.

[5] Defendants contend that the "except with respect to Federal taxes" clause of the Declaratory Judgment Act, 28 U.S.C. § 2201, also bars this suit. While it is settled that the federal tax exception to the Declaratory Judgment Act is at least as broad as the Anti-Injunction Act, *see* Bob Jones University v. Simon, 416 U.S. 725, n.7 (1974), the Supreme Court has not ruled on whether

In addition, although they have not strenuously pressed the argument, defendants contend that plaintiffs have no standing to maintain this action. The Court, in its ruling from the bench on June 17, 1977, rejected both these arguments. The Court continues to find defendants' contention that plaintiffs lack standing to be without merit. However, for the reasons stated herein, the Court concludes that, in light of the Anti-Injunction Act, this suit for declaratory and injunctive relief cannot be maintained at least until plaintiffs have demonstrated to the Court that they have made all good-faith efforts to stage a "friendly" third-party challenge to Revenue Ruling 77-85.

The Anti-Injunction Act, 26 U.S.C. § 7421(a), upon which defendants primarily rely in moving to dismiss this action, provides:

> Except as provided in [certain sections not here pertinent], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The purpose of this Act was described by the Supreme Court in the seminal case of *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962):

> The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be

the Declaratory Judgment Act is even more preclusive. *Id.* However, the Court of Appeals for this Circuit has held that the Declaratory Judgment Act is *coterminous* with the Anti-Injunction Act, "Americans United" Inc. v. Walters, 477 F.2d 1169, 1176 (D.C. Cir. 1973), *rev'd on other grounds*, Alexander v. "Americans United" Inc., 416 U.S. 752 (1974); Eastern Kentucky Welfare Rights Organization v. Simon, 506 F.2d 1278, 1285 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26 (1976); and this Court has adhered in the past to this interpretation. Center on Corporate Responsibility v. Shultz, 368 F. Supp. 863, 879 n.34 (D.D.C. 1973). Accordingly, it is unnecessary to consider defendants' Declaratory Judgment Act argument.

> due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. . . .

The Court, however, recognized an exception to the literal proscription of the Act:

> [I]f it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and the attempted collection may be enjoined if equity jurisdiction otherwise exists.

370 U.S. at 7. *See Center on Corporate Responsibility v. Shultz,* 368 F. Supp. 863, 878-880 (D.D.C. 1973).

In support of their motion to dismiss, defendants assert that (1) the Anti-Injunction Act is applicable here since this suit effectively seeks to restrain the assessment or collection of taxes (from annuitants), and (2) the *Williams Packing* exception to the Act is inapplicable since this case is not one in which "under no circumstances could the Government ultimately prevail." 370 U.S. at 7. Plaintiffs, in fact, do not contest that this suit seeks to restrain the assessment or collection of taxes; nor do they seriously contend that the *Williams Packing* exception is applicable to the present case. Rather, plaintiffs argue that the Anti-Injunction Act is inapplicable herein because the Act was not intended to bar suits seeking injunctive and/or declaratory relief in the district courts by aggrieved plaintiffs that have no other access to judicial review by way of either a Tax Court or a refund suit.

Plaintiffs' contention that the Anti-Injunction Act is inapplicable in cases in which the plaintiff has no other means of obtaining judicial review of an IRS action (and that such a case falls within a "second exception" to the Act, separate and distinct from the *Williams Packing* exception)

has been expressly left unresolved by the Supreme Court. In *Bob Jones U.,* the Court said:

> This is not a case in which the aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different.

416 U.S. at 747. Notwithstanding the *Bob Jones U.* Court's decision not to address this issue, this Court concludes that the Anti-Injunction Act was not intended to preclude pre-enforcement review of Service actions where the action will otherwise *never* be subject to judicial review. *See National Restaurant Association v. Simon,* 411 F. Supp. 993, 995-96 (D.D.C. 1976), *Cf. Eastern Kentucky Welfare Rights Organization v. Simon,* 506 F.2d 1278, 1284 (D.C. Cir. 1974), *vacated on other grounds,* 426 U.S. 26 (1976). Any contrary conclusion would raise serious questions about the constitutionality of the Anti-Injunction Act in such cases for, as Justice Brandeis said in *Phillips v. Commissioner,* 283 U.S. 589, 596-97 (1931), "mere postponement of the judicial enquiry [in taxation cases] is not a denial of due process, *if the opportunity given for the ultimate judicial determination of the liability is adequate.*" (Emphasis added.) *See also Commissioner v. Shapiro,* 424 U.S. 614, 629-32 (1976).

This conclusion that the Anti-Injunction Act was not intended to bar suits for declaratory and/or injunctive relief when the Service action will otherwise never be subject to judicial review is not, however, dispositive of the instant case: The circumstances of this case are more complex than that. Here, it is undisputed that plaintiffs themselves have no means of obtaining judicial review: The effect of Revenue Ruling 77-85 is that all investment gains in the custodial account will be treated as includible in the gross income of the policyholder rather than the insurance company (here, plaintiff FIAC). Since plaintiffs' taxes will necessarily be *lower* as a result of the Ruling, plaintiffs will *never* have an opportunity to bring either a refund action

pursuant to 26 U.S.C. § 7422 or a Tax Court challenge to a deficiency assessment.

Moreover, as a result of the grandfather clause included by the Service in the Ruling for extant investment annuity contracts, no present policyholders will incur higher taxes as a result of the Ruling, and thus be able to challenge the Service's Ruling, *unless* they make an additional contribution to their custodial account. And, as a result of plaintiffs' cessation of sales in response to the Ruling, the rescission by the SEC of its prior "no-action" letter, and the advance notice requirement imposed by the Pennsylvania Insurance Commissioner, no new investment annuity contracts are being sold at least pending the outcome of this suit. However, a third-party could be in a position to challenge Revenue Ruling 77-85 if either (1) a "friendly" present policyholder, *see Bob Jones University v. Simon,* 416 U.S. at 748 n.21, were to contribute an additional sum to his present custodial account (and thereby run the risk of losing the grandfather protection for the entire account), or (2) plaintiff FIAC were to sell a new account to a "friendly" purchaser. Thus, while it would require "staging," it is at least theoretically feasible for a "third-party" policyholder to obtain judicial review of Revenue Ruling 77-85. The present case is therefore one that "turns upon . . . resolution" of a second issue left unresolved by the Supreme Court in *Bob Jones U.*—whether the availability of a third-party suit "constitutes an adequate legal remedy for correcting illegal actions on the part of the Service," 416 U.S. at 748 n.21; in other words, whether the unavailability of a first-party suit (notwithstanding the potentiality of a third-party suit) is tantamount to "no access at all to judicial review."[6]

[6] It should be noted that the phrase "adequate legal remedy" as used by the Supreme Court in footnote 21 of the *Bob Jones U.* opinion is somewhat ambiguous. It is at least arguable that the Court intended by its use of this phrase to suggest that the unavailability of a first-party suit is an appropriate consideration

The Court has given careful consideration to the due process implications of requiring plaintiffs herein to stage and then rely upon a third-party suit to challenge the legal basis of Revenue Ruling 77-85. In particular, the Court has focused on the concerns that (1) it may be difficult for plaintiffs to find an appropriate third-party willing to challenge the Ruling here in issue by means of either a

in determining whether a given plaintiff is suffering irreparable injury, "an essential prerequisite for injunctive relief and only one part of the *Williams Packing* test." Commissioner v. "Americans United" Inc., 416 U.S. 752, 762 (1974) (companion case to *Bob Jones U.*). The Supreme Court itself recognized the ambiguity of this phrase in *"Americans United", id.* at 761-62, and at least one lower court has apparently interpreted "adequate legal remedy" to be merely a consideration relevant to a finding of irreparable injury. Investors Syndicate of America, Inc. v. Simon, 407 F. Supp. 83, 85 (D.D.C. 1975) (Court first concluded that plaintiff corporation had no "adequate remedy at law" since only certificate holders, whose taxes would be increased, would have first-party suit; court then considered first prong of *Williams Packing* exception and concluded that "plaintiff has not carried the burden of showing that under no circumstances can the government ultimately prevail in this action.") *See also* Cattle Feeders Tax Committee v. Shultz, 504 F.2d 462 (10th Cir. 1974).

Notwithstanding this ambiguity, this Court feels confident that its interpretation of the phrase "adequate legal remedy" as a possible second exception to the Anti-Injunction Act is fully supported by the context of footnote 21 in the *Bob Jones U.* opinion and by the Court's subsequent discussion in *"Americans United"*. The text immediately preceding footnote 21 emphasizes the Court's conclusion that plaintiff Bob Jones U. was afforded "a full, albeit delayed, opportunity to litigate the legality" of the Service's action. 416 U.S. at 746. Moreover, footnote 21 itself indicates that one of the Court's concerns with regard to the adequacy of third-party suits was that the aggrieved party "must rely on the [third-party] to present the relevant arguments on [its] behalf." 416 U.S. at 747 n.21. In *"Americans United"*, the Court concluded that a refund action by the plaintiff organization was adequate to give plaintiff "a full opportunity to litigate the legality of the Service's action." 416 U.S. at 762. This repeated concern indicates that the Court intended the phrase "adequate legal remedy" to mean adequate opportunity to challenge the legal basis of the action giving rise to plaintiff's alleged injury.

Tax Court suit or a refund suit in either the district court or the Court of Claims, and (2) it may be fundamentally unfair to require plaintiffs to rely upon such a third-party to proffer the relevant legal arguments on plaintiffs' behalf. *See Bob Jones University v. Simon,* 416 U.S. at 747 n.21; note 6 *supra.* On the other hand, the Court cannot ignore that a "manifest purpose" of the Anti-Injunction Act is to require, *whenever possible,* that the legal right to disputed tax funds be litigated either in a refund or Tax Court suit. *See Enochs v. Williams Packing & Navigation, Inc.,* 370 U.S. at 7; *Bob Jones University v. Simon,* 416 U.S. at 736-37. Moreover, in assessing the aforementioned factors, the Court must be mindful that consideration of the irreparable injury that plaintiffs might incur as a result of the more prolonged and circuitous route of third-party litigation is not a pertinent consideration in determining whether a third-party suit would afford plaintiffs herein "an adequate legal remedy." *See Enochs v. Williams Packing & Navigation,* 370 U.S. at 6.

Upon consideration of these factors in the context of this case, the Court concludes that the result reached by the District Court for the District of Delaware in *International Telephone & Telegraph Corp. v. Alexander,* 396 F. Supp. 1150 (1975) [hereinafter, *ITT*], albeit on slightly different facts, represents the appropriate resolution of the countervailing interests. The *ITT* court discussed a number of ways in which the plaintiff corporation therein, which like plaintiffs herein could not itself challenge the Service's action by way of a Tax Court or refund suit, could ensure that the relevant legal arguments were fully presented to the appropriate tribunals. Among these ways were: amicus curiae; intervention; and "friendly taxpayer-shareholder" suit. The Court expressly said:

> Were this an action in which ITT alleged that the aforegoing opportunities to present its grievances were foreclosed, the Court might not be inclined to construe Sections 7421(a) and 2201 as jurisdictional bars to the instant proceeding. Such, however, is not the case.

396 F.Supp. at 1168. Thus, the court dismissed ITT's complaint for want of jurisdiction.

The present case is unlike *ITT* in that plaintiffs herein would have to take certain affirmative steps merely to enable a "friendly" third-party taxpayer-policyholder, such as a director, to challenge Revenue Ruling 77-85 by way of a Tax Court or refund suit. For example, plaintiff FIAC would have to sell a new investment annuity policy to such a "friendly" third-party since all extant policyholders have been immunized from the effect of the Ruling as a result of the grandfather clause. The Court has every reason to believe, however, that if such a sale could be arranged, plaintiffs would be able to participate fully with the "friendly" policyholder-taxpayer in the presentation of a full and adequate legal challenge to the Ruling before an appropriate tribunal *no less than if* plaintiffs themselves were subject to tax liability resulting from the Ruling. While the Court finds the "staging" necessary to arrange such a third-party suit to be distasteful as a matter of policy, the Court concludes that the Anti-Injunction Act demands, at the very least, that plaintiffs make all good-faith efforts to bring about such a suit so that the legality of the Service's action can be litigated either in a Tax Court suit or in a refund suit in either the district court or the Court of Claims.[7]

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[7] As noted above, a second way in which plaintiffs could stage a friendly third-party challenge to Revenue Ruling 77-85 is if an existing investment annuity policyholder could be induced to make additional contributions to his custodial account. The Court recognizes that no reasonable policyholder is likely to make such an additional contribution in the face of the Service's ruling that *such a present policyholder's existing account will only be protected if* "there are no other contributions to such accounts after March 9, 1977." Revenue Ruling 77-85. It appears to the Court that if the Service were willing to except from this "sanction" a contrition or contributions designed to give rise to a friendly third-party suit, as described herein, then plaintiffs may be in a better position to stage such a third-party challenge to Revenue Ruling 77-85 by way of a Tax Court or refund suit.

This conclusion compels the Court, as a final matter, to ascertain whether the plaintiffs herein have made the requisite "good-faith efforts." Based upon the representations made by counsel in their memoranda and in their oral arguments, the Court finds that plaintiffs have *not* as of this date satisfied the Court that they have made all good-faith efforts to stage a friendly third-party suit. The Court recognizes that the actions of the SEC and the Insurance Commissioner of Pennsylvania, which were taken in anticipation of Revenue Ruling 77-85, present obstacles to the sale of a new investment annuity policy for the purpose of staging a friendly third-party suit. However, at the very least, plaintiffs must attempt in good-faith to procure permission from both of these entities for the limited purpose of challenging the legality of Revenue Ruling 77-85. Accordingly, the Court will at this time reserve ruling on defendants' motion to dismiss (as well as plaintiffs' pending motion on the merits).

The Court will give plaintiffs until September 9, 1977, to make all good-faith efforts to procure permission from the SEC and the Pennsylvania Insurance Commissioner for the sale of a new investment annuity contract (or contracts) in order to stage a friendly third-party challenge to Revenue Ruling 77-85. If such efforts are of no avail, plaintiffs shall file appropriate affidavits with the Court by September 18, 1977. Defendants shall then have until September 19, 1977, to submit such affidavits, if any, they deem appropriate. The Court will then reconsider whether to deny defendants' motion to dismiss.

An Order in accordance with the foregoing will be issued of even date herewith.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

July 12th, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 77-810

Investment Annuity, Inc., et al., *Plaintiffs,*

v.

W. Michael Blumenthal, et al., *Defendants.*

Order

Filed July 12, 1977

Upon consideration of defendants' motion to dismiss and plaintiffs' motion for preliminary injunction, the respective points and authorities in support thereof and in opposition thereto, the arguments of counsel in open court, and the entire record herein, and for the reasons stated in the Court's Memorandum Opinion issued of even date herewith, it is, by the Court, this 12th day of July, 1977,

Ordered, that plaintiffs shall have until September 9, 1977, to make all good-faith efforts to make arrangements that will permit the staging of a friendly third-party challenge to Revenue Ruling 77-85 by way of either a Tax Court or a refund suit; and it is

Further Ordered, that plaintiffs shall file any appropriate affidavits with the Court by September 18, 1977; and it is

Further Ordered, that defendant shall file any appropriate affidavits with the Court by September 19, 1977.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 77-810

INVESTMENT ANNUITY, INC., et al., *Plaintiffs,*

v.

W. MICHAEL BLUMENTHAL, et al., *Defendants.*

Order

(Filed September 28, 1977)

By Order and Memorandum Opinion of July 12, 1977, the Court deferred ruling on defendants' pending motion to dismiss to permit plaintiffs an opportunity "to stage a 'friendly' third-party challenge to Revenue Ruling 77-85 by way of either a Tax Court or a refund suit." In accordance with the aforesaid Order and Memorandum Opinion, plaintiffs attempted to procure permission from both the Insurance Commissioner of the Commonwealth of Pennsylvania and the Securities and Exchange Commission "for the sale of a new investment annuity contract (or contracts) or to accept an additional contribution under an existing contract in order to stage a friendly third-party challenge to *Rev. Rul. 77-85* through a Tax Court or refund suit." *See* Exh. A to Plaintiff's Response to Court's Opinion and Order of July 12, 1977 (hereinafter, Plaintiffs' July 26, 1977 Response).

Both the Insurance Commissioner of the Commonwealth of Pennsylvania and the Securities and Exchange Commission responded to plaintiffs' request. The Insurance Commissioner denied plaintiffs' request both because of the legal issues raised thereby and because he deemed the request to be contrary to the public interest. *See* Exh. B to Plaintiffs' July 26, 1977 Response. The Securities and Exchange Commission also refused plaintiffs' request: It

concluded that in view of the decision by the Insurance Commissioner, "it would be inappropriate to give further consideration to [plaintiffs'] July 18, 1977 letter requesting a 'no-action' position with respect to the sale of a single investment annuity contract." *See* Plaintiffs' Supplemental Response to Court's Opinion and Order of July 12, 1977.

Upon consideration of these denials of plaintiffs' requests, the affidavits and memoranda submitted by the parties in response to the Court's Order and Memorandum Opinion, and particularly the parties' responses to the Court's direction of September 6, 1977 that the parties work together to explore possible ways of arranging a friendly third-party challenge to *Rev. Rul.* 77-85, as well as the entire record herein, the Court concludes that plaintiffs have now made *all* "good-faith efforts to bring about [a friendly third-party] suit so that the legality of the Service's action can be litigated either in a Tax Court suit or in a refund suit in either the district court or the Court of Claims." *See* Memorandum Opinion, at 10. The Court finds that notwithstanding these efforts, plaintiffs have been *totally* unable to make any sale (or procure any additional contribution to an existing contract) for the purpose of staging a third-party challenge to the Service's action without transgressing the clear and unequivocal ruling of the Insurance Commissioner of the Commonwealth of Pennsylvania and without flaunting the enforcement authority of the Securities and Exchange Commission. In view of these impediments to the sale of any additional investment annuity contracts (and to the acceptance of any additional contributions on existing contracts), the Court concludes, both as a matter of fact and as a matter of law, that this case is one "in which the aggrieved party has *no access at all* to judicial review." *See Bob Jones University v. Simon,* 416 U.S. 725, 747 (1974).

This conclusion compels the Court to deny defendants' motion to dismiss for, as the Court previously concluded

in its Memorandum Opinion of July 12, 1977, "the Anti-Injunction Act was not intended to preclude pre-enforcement review of Service actions where the action will otherwise *never* be subject to judicial review." *See* Memorandum Opinion, at 6.[1]

Accordingly, the Court is now prepared to consider the merits of plaintiffs' challenge to *Rev. Rul.* 77-85. It appears to the Court that, because of the extraordinary amount of attention that the parties have necessarily devoted to the complex jurisdictional questions herein, the parties may wish to supplement their original memoranda on the merits. The Court will therefore allow both parties until October 4, 1977, to file additional memoranda on the merits, and will allow both parties until October 7, 1977 to file any replies to such supplemental memoranda.

As a final matter, the Court feels that it is appropriate to note that defendants apparently continue to maintain that *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), permits this Court to grant plaintiffs the relief they seek *only* if "the Government is without 'any basis' for its substantive position." Defendants' Reply To Plaintiffs' Statement In Response To Court's Direction Of September 6, 1977, at 3. This argument ignores the basis of this Court's decision to deny defendants' motion to dismiss, which is that the Anti-Injunction Act *does not apply* to suits such as the instant one where the aggrieved plaintiffs have no access at all to judicial review. Since the Anti-Injunction Act is inapplicable hereto, the *Williams Packing* exception to the Anti-Injunction Act is also inapplicable to this case, and there is therefore no reason why this Court should not consider plaintiffs' challenge under

[1] *Cf. American Society of Travel Agents, Inc.* v. *Blumenthal*, No. 75-1782, Slip op. (September 15, 1977) (Bazelon, C.J., dissenting opinion, at 2, n.2) ("The spectre of such unreviewable discretion, especially when, as is alleged in these two cases, it is exercised in contradiction to the commands of Congress, is also discomforting.")

the "arbitrary and capricious" standard of 5 U.S.C. § 706 (2)(A).

In accordance with the foregoing, it is, by the Court, this 28th day of September, 1977,

ORDERED, that defendants' motion to dismiss pursuant to the Anti-Injunction Act be, and the same hereby is, denied; and it is

FURTHER ORDERED, that the parties shall have until October 4, 1977, to file any supplemental memoranda on the merits, and until October 7 to file any replies to such supplemental memoranda.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 77-810

INVESTMENT ANNUITY, INC., et al., *Plaintiffs,*

v.

W. MICHAEL BLUMENTHAL, et al., *Defendants.*

APPEARANCES:

For the Plaintiffs:

Herbert L. Awe, Esquire
William L. Goldman, Esquire
Joseph B. Levin, Esquire
Washington, D.C.

For the Defendants:

Donald J. Gavin, Esquire
John M. Cunningham, Esquire
Washington, D.C.

Memorandum Opinion of United States District Judge Charles R. Richey

(Filed November 9, 1977)

This case is now before the Court for a final determination on the merits. Initially, this case came before the Court on plaintiffs' motion for preliminary injunction. Defendants then filed a motion to dismiss on the ground that the instant action was barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a) (1970). While the Court had these initial motions under advisement, the parties, on June 27, 1977, stipulated that no material facts were in dispute and that a final disposition of the case on the merits would be appropriate.

After deferring ruling on defendants' motion to dismiss in order to permit plaintiffs to make good-faith efforts to challenge the revenue ruling here in issue in either the Tax Court or in a refund action,[1] and based on its finding that "this case is one 'in which the aggrieved party has *no access at all* to judicial review,' *Bob Jones University v. Simon,* 416 U.S. 725, 747 (1974)," the Court, by Order of September 28, 1977, denied defendants' motion to dismiss. Accordingly, pursuant to the stipulation of the parties, the case is now before the Court for a final determination upon the merits as provided for by Fed. R. Civ. P. 56(c).

I. BACKGROUND AND FACTS

Since the facts of this case set forth in the Court's initial Memorandum Opinion of July 12, 1977, on the motion to dismiss remain unchanged, the Court will quote the Background section of that opinion in order to provide the reader of this opinion with a recapitulation of the essential facts involved in this dispute:

> This case concerns the tax treatment to be accorded to what have been termed *investment annuity contracts.* Specifically, the legal issue before the Court is whether investment annuity contracts are "contracts with reserves based on a segregated asset account" within the meaning of section 801(g)(1)(B) of the Internal Revenue Code, 26 U.S.C. § 801(g)(1)(B).
>
> An investment annuity contract is like a conventional annuity contract in that both involve the pur-

[1] The Court had initially ruled from the Bench on June 17, 1977, and denied defendants' motion to dismiss. The Court then reconsidered this denial and determined that a final ruling on the motion to dismiss should be deferred pending the efforts described in the text of the present opinion. The stipulation referred to in the text of the present opinion was presented to the Court prior to the issuance of the Court's Memorandum Opinion of July 12, 1977, which reconsidered the initial denial of the motion to dismiss.

chase by the policyholder of a promise by the insurer to make payments to the annuitant at a specified maturity date (often the annuitant's date of retirement). As in the case of all annuities, the investment annuity is predicated on actuarily-derived mortality and expense guaranties made to the policyholder by the insurance company. An investment annuity is like a variable annuity (and unlike a fixed-dollar annuity) in that the amount of the annuities paid on or after the maturity date reflect the investment return and market value of the "segregated asset account." The unique feature of an investment annuity contract—and the only substantive difference between it and other variable annuity arrangements—is that a separate "segregated asset account," known as a "custodial account," is established for each investment annuity contract, and the policyholder (rather than the insurance company) directs how the assets in the custodial account are to be invested.[1]

This case arises out of the action of the Internal Revenue Service (IRS) in issuing Revenue Ruling 77-85 on March 9, 1977. Internal Revenue Bulletin No. 1977-15, at 7-9 (April 11, 1977). Prior to that date, and since 1965,[2] the IRS had treated investment annuity contracts as conventional segregated asset annuity accounts with the result that they were entitled to the favorable tax treatment afforded by section 801 (g)(1)(B). In brief, the tax advantages of such treatment are: (1) the annual investment return of the segregated asset account is included not in the policyholder's gross income, but rather in the investment yield of the insurance company, *see* 26 U.S.C. § 804(c), with the result that such investment return is taxed to the insurance company at a "favorable" rate; and (2) when the annuities are paid upon maturity, the gain reflected in the annuity payments, *see* 26 U.S.C. §§ 72 (a)-(c), is then included in the annuitant's gross income.[3] Revenue Ruling 77-85 reversed the previous determination by the IRS and held that investment annuity contracts are *not* "contracts with reserves based on a segregated asset account" within the meaning of section 801(g)(1)(B). The effect of this ruling is that all income produced by the assets in the custodial account are includible in the gross income of the policyholder for the year in which they become added to the custodial account. The Ruling did, however, "grandfather" all existing investment annuity contracts by holding that all such contracts will continue to be treated for tax purposes as "contracts with reserves based on segregated asset accounts" within the meaning of section 801(g)(1)(B).

[1] The "custodial account" is so-called because it is administered by a third-party custodian, generally a bank selected by the policyholder.

[2] The first letter ruling on the tax treatment to be accorded investment annuity contracts is dated August 10, 1965. (Exhibit B, Letter from John W. S. Littleton, Director, Income Tax Division, to John A. Cardon). Subsequent letter rulings consistent with this 1965 ruling were issued on November 8, 1965 (Exhibit C), November 29, 1967 (Exhibit D), and April 25, 1972 (Exhibit E).

On October 20, 1976, the Service announced in News Release IR-1679 that it was reconsidering the tax treatment accorded investment annuity contracts.

Plaintiffs herein are Investment Annuity, Inc., (IA) and First Investment Annuity Co. (FIAC). FIAC is a wholly-owned subsidiary of IA and is IA's sole business. FIAC is licensed in Pennsylvania as a legal reserve life insurance company and was organized for

[3] An annuitant will benefit from such "deferred" tax treatment if, when the annuity is paid, the annuitant has less taxable income (and is thus in a lower tax bracket) than he has in the year(s) the investment yields profits.

the purpose of issuing and marketing investment annuities of various types. Upon being advised of the substance of Revenue Ruling 77-85, as well as actions taken by the Securities and Exchange Commission and the Insurance Commissioner of the Commonwealth of Pennsylvania in anticipation of the ruling,[4] plaintiff FIAC immediately ceased selling investment annuity contracts. It has not, since March 9, 1977, sold any new investment annuity contracts, nor has it received any additional contributions to existing accounts. Plaintiffs now seek a declaratory judgment that Revenue Ruling 77-85 is unlawful, beyond statutory authority, and in violation of the Internal Revenue Code. In addition, they seek injunctive relief to restrain the defendants from implementing Revenue Ruling 77-85 and from refusing to treat investment annuity contracts as within the purview of section 801(g)(1)(B).

[4] FIAC had been selling its investment annuity contracts in reliance on a no-action letter issued by the Securities and Exchange Commission. On March 7, 1977, the SEC, in anticipation of Revenue Ruling 77-85, rescinded its no-action assurance. Also in anticipation of Revenue Ruling 77-85, the Insurance Commissioner of the Commonwealth of Pennsylvania, on March 8, 1977, notified FIAC that no further sales of investment annuity contracts could be made without his prior approval.

In addition to the undisputed facts set forth above, one other sequence of events, also undisputed, is pertinent to the Court's consideration of the merits: On August 29, 1977, the Internal Revenue Service issued to a competitor of plaintiff FIAC a private ruling which declared that certain variable annuity contracts were considered to be "contract[s] with reserves based on a segregated asset account" within the meaning of section 801(g)(1)(B) of Title 26 of the United States Code. The annuity contracts that were the subject of this private ruling permitted substantial investment control on the part of the policyholder

not materially different in degree than the amount of policyholder investment control inherent in the investment annuity contracts marketed by plaintiff FIAC. Upon learning of this private ruling, plaintiffs filed a motion seeking immediate entry of judgment in their favor. The Court then, upon finding that the private ruling of August 29, 1977, raised "grave questions about the propriety of Revenue Ruling 77-85," ordered the defendants to respond immediately to plaintiff's allegations. Defendants thereafter, on September 13, 1977, revoked the August 29, 1977, private ruling.

II. Revenue Ruling 77-85

As indicated above, plaintiffs herein seek judicial review of Revenue Ruling 77-85 which reversed a series of private rulings that had declared that the investment annuity contracts marketed by plaintiff FIAC were "contracts with reserves based on a segregated asset account" within the meaning of 26 U.S.C. § 801(g)(1)(B). Significantly, the basis for the Service's determination that investment annuity contracts are not within the purview of section 801(g)(1)(B) was *not* that these contracts failed to satisfy the express statutory criteria of section 801(g)(1)(B). Rather, the Ruling was premised expressly on the Service's determination that an investment annuity policyholder's "substantial incidents of ownership" with regard to the assets in the custodial account, and particularly his investment control over such assets, warrant the conclusion that the policyholder and not the issuing life insurance company is the owner of the custodial account assets for federal tax purposes. And, reasoned the ruling, since the life insurance company cannot be taxed at all for the income derived from assets which are owned by another taxpayer (here, the policyholder), section 801(g)(1)(B) and the other Code provisions governing life insurance company taxation do not apply to the custodial account assets of an investment annuity contract.

III. Standard of Review

In reviewing Revenue Ruling 77-85, this Court is guided by the well-established principles articulated by Judge Parker in *Eastern Kentucky Welfare Rights Organization v. Shultz,* 370 F. Supp. 325, 334-35 (D.D.C. 1973), *rev'd on other grounds sub nom. Eastern Kentucky Welfare Rights Organization v. Simon,* 506 F.2d 1278 (D.C. Cir. 1974), *vacated on other grounds,* 426 U.S. 26 (1976), which were approved on appeal by the Court of Appeals for this Circuit:

> Any discretion incorporated into the IRS's authority to promulgate rules and regulations is necessarily limited by the understanding that Congress, not the Treasury, is responsible for the formulation and institution of basic tax policy. It is true, as a matter of jurisprudence and efficient tax administration, that courts have regularly paid deference to the expertise attributed to the IRS in tax related matters and therefore judicial interference is reluctantly employed. However, this exhibition of restraint is predicated upon the assumption that administrative rulings will do no more than effectuate, implement and clarify the provisions of the Code which have been congressionally enacted. . . . When this assumption is proven wrong, the courts must act to rectify any administrative determination which is not in accord with the Code.

506 F.2d at 1286.

This principle of judicial review—that the IRS has no authority to take administrative actions inconsistent with the Internal Revenue Code—has been uniformly embraced by the courts.[2] *See, e.g., Manhattan General Equipment Co.*

[2] In the language of the APA, administrative actions that are inconsistent with the Internal Revenue Code are "not in accordance with law," 5 U.S.C. § 706(2)(A), and are "in excess of statutory . . . authority." 5 U.S.C. § 706(2)(C).

v. Commissioner, 297 U.S. 129, 134 (1936) ("A regulation which . . . operates to create a rule out of harmony with the statute is a mere nullity."); *Service Life Insurance Co. v. United States,* 293 F.2d 72, 77 (8th Cir. 1961) ("It is elementary that revenue rulings and even Treasury Regulations are without force if they are in conflict with the statute."); *Russell v. United States,* 260 F. Supp. 493, 500 (N.D. Ill. 1966) ("A revenue ruling which runs counter to the provisions of a statute is a legal nullity.") It is also well-established that even where the IRS's interpretation of the Code is not expressly inconsistent with the statutory language, such an interpretation will not be sustained if it is "unreasonable and unrealistic." *United States v. Cartwright,* 411 U.S. 546, 551 (1973). *See Coca-Cola Bottling Co. v. United States,* 487 F.2d 528, 532 (Ct. Cl. 1973); *McMartin Industries, Inc. v. Vinal,* 441 F.2d 1274, 1275-76 (8th Cir. 1971); *Quaker City Iron Works, Inc. v. United States,* 256 F. Supp. 450, 453 (E.D. Pa. 1966).

The above-articulated principles of judicial review are appropriately applied in all cases in which IRS action is challenged. However, when, as in the instant case, the action challenged is the issuance of a revenue ruling (rather than a regulation or a Treasury Decision), the reviewing court must bear in mind that

> [a revenue] ruling is merely the opinion of a lawyer in the agency and must be accepted as such. It may be helpful in interpreting a statute, but it is not binding on the Secretary or the courts. It does not have the effect of a regulation or a Treasury Decision.

Stubbs, Overbeck & Associates v. United States, 445 F.2d 1142, 1146-47 (5th Cir. 1971). Revenue rulings are *not* intended to create legally binding rights and/or obligations, and they are consistently treated as such by the Service for purposes of the procedural requirements of the Administrative Procedure Act, 5 U.S.C. § 553. Revenue rulings thus

fit "the classic definition of an 'interpretative rule.'" Brief for the Secretary of the Treasury, *Eastern Kentucky Welfare Rights Organization v. Simon*, 426 U.S. 26 (1976), at 102. *See generally*, Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 Mich. L. Rev. 521 (1977); Comment, *Revenue Rulings and the Federal Administrative Procedure Act*, 1975 Wisc. L. Rev. 1135. As such, this Court's review "is not limited to determining 'arbitrariness.'" K. Davis, *Administrative Law of the Seventies*, § 5.03-1, at 154 (1976). Rather, if this Court, after giving *due* deference to the agency's expertise, finds the Service's statutory interpretation as embodied in Revenue Ruling 77-85 to be erroneous, this Court can, and indeed must, substitute its judgment for that of the Service.

IV. Revenue Ruling 77-85 Is An Erroneous and Unreasonable Interpretation of the Internal Revenue Code, and, in View of the Fact That Substantial Deference to the Agency's Expertise Is Not Warranted by the Facts of This Case, the Court Will Declare the Ruling to be Unlawful and Beyond the Service's Statutory Authority.

The Court has given careful and serious consideration to the arguments propounded by both sides in this controversy. While as a general rule this Court is reluctant, as are most other courts, *see Eastern Kentucky Welfare Rights Organization v. Shultz*, 370 F. Supp. at 334, *quoted supra*, to interfere with the IRS in tax-related matters, application of the aforestated principles of judicial review to the Service's decisions in Revenue Ruling 77-85 compel this Court to conclude that Revenue Ruling 77-85 is erroneous and unreasonable, and therefore unlawful and beyond the Service's statutory authority. Accordingly, for the reasons hereinafter stated, the Court will grant plaintiffs the declaratory relief they seek.

A. *Revenue Ruling 77-85 Is Unlawful And Beyond The Service's Statutory Authority In That Its Determination That The Policyholder, Rather Than The Issuing Life Insurance Company, Is The Owner Of The Investment Annuity Custodial Account Assets Is Erroneous And Unreasonable.*

1. *Statutory Language*

The starting point for analysis of the correctness of Revenue Ruling 77-85 must of course be the express statutory language of sections 801(g)(1)(B) and 61, the pertinent Code provisions. Revenue Ruling 77-85 does *not* dispute the fact that the investment annuity contractual arrangements described above satisfy all the express requirements of section 801(g)(1)(B), which provides:

> —For purposes of this part, a "contract with reserves based on a segregated asset account" is a contract—
>
> (i) which provides for the allocation of all or part of the amounts received under the contract to an account which, pursuant to State law or regulation, is segregated from the general asset accounts of the company,
>
> (ii) which provides for the payment of annuities, and
>
> (iii) under which the amounts paid in, or the amount paid as annuities, reflect the investment return and the market value of the segregated asset account.
>
> If a contract ceases to reflect current investment return and current market value, such contract shall not be considered as meeting the requirements of clause (iii) after such cessation.

While defendants, in their litigation memoranda, have attempted to interject the argument that investment annuity

contracts do not satisfy the express requirements of section 801(g)(1)(B) because the term "received" in clause (i) requires investment control over the account assets to be received by the insurance company, the Court finds this interpretation to be strained, unsupported, and wholly untenable. Thus, the statutory language of section 801(g)(1)(B) is of little help to the Court. Similarly, the exceedingly general language of section 61, which defines "gross income," offers no guidance to the Court.

2. *Legislative History*

Accordingly, the Court must next turn to the legislative history of sections 61 and 801(g)(1)(B). Here again, however, the Court finds no guidance. As both parties readily admit, the concept of an "investment annuity contract" was unknown to Congress when it passed section 61 of the Internal Revenue Code in 1954, and it was also unknown when Congress passed the original version of section 801(g) in 1959 and the present version of section 801(g)(1)(B) in 1962. Defendants, however, have pointed to several references in the legislative histories of both the 1959 and 1962 enactments that speak of "the insurance company's investment experience." *See, e.g.*, S. Rep. No. 86-291, 86th Cong., 1st Sess. 35 (1959); S. Rep. No. 87-2109, 87th Cong., 2d Sess. 7 (1962). Defendants argue that since Congress only contemplated annuity arrangements wherein the insurance company exercised investment control, and since Congress expressly focused on this aspect of annuity contracts in the legislative history, Congress must have intended to limit the applicability of section 801(g)(1)(B) to standard variable annuities.

The Court finds defendants' argument entirely unpersuasive: The mere fact that Congress did not consider an as-yet uninvented alternative to a "statutorily-approved" arrangement cannot be said to *bar* application of the statute to a later-invented alternative if that alternative is comparable to the "approved" arrangement in substantially

all respects. Defendants' construction ignores the generally-accepted canon of statutory construction that where "Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators." *Gelfand v. United States*, 375 F.2d 807, 813 (Ct. Cl. 1967), *quoting Barr v. United States*, 324 U.S. 83, 90 (1954). *See* 2A *Sutherland Statutory Construction*, § 49.02 (Sands ed. 1973). As the Ninth Circuit suggested in *Pool v. Commissioner*, 251 F.2d 233, 237-38 (1957), *cert. denied*, 356 U.S. 938 (1958), this principle is particularly apposite to tax cases:

> The excellence of our jurisprudence is its flexibility. In applying general statutory language to particular situations, courts best conform to the tradition of growth of our system when they adopt realistically general principles to different or constantly changing situations. In applying tax statutes, the best result is always achieved when we avoid harsh crystallizations.

For these reasons, this Court concludes that the legislative history should not be read as either expressly or implicitly supporting defendants' constricted interpretation of section 801(g)(1)(B).

3. *Analysis of the Service's Ruling*

In view of the dearth of guidance provided by both the statutory language and legislative history of both sections 61 and 801(g)(1)(B), the Court must analyze Revenue Ruling 77-85 in terms of its reasonableness and consistency with other provisions of the Internal Revenue Code. As section II, *supra*, states, Revenue Ruling 77-85 "was premised expressly on the Service's determination that an investment annuity policyholder's 'substantial incidents of ownership' with regard to the assets in the custodial account, and particularly his investment control over such assets, warrant the conclusion that the policyholder and

not the issuing life insurance company is the owner of the custodial account assets for federal tax purposes." Defendants assert, and plaintiffs do not disagree, that "the determination of the ownership of a given set of assets requires the weighing of all of the various property rights attaching to those assets . . . ." Defendants' Supplemental Memorandum on the Merits, at 5 (October 4, 1977). While defendants at various times in this litigation have likened investment annuity contracts to other transactional forms (*e.g.*, pledge, trust, escrow account), they admit that

> ultimately the Court must weigh on their own terms all of the rights which a FIAC policyholder retains in the assets he contributes to his custodian account and all of the rights which he surrenders; and the Court must resolve the question of the ownership of those assets in light of this ultimately *sui generis* evaluative process.

Id. at 5.

There can be no doubt that investment annuity policyholders retain substantial rights in the custodial account assets. Nevertheless, the Court finds that the following reasons warrant the conclusion that the investment annuity policyholder is *not* the owner of the account assets and should not be taxed as such:

First, in weighing the rights retained against the rights surrendered by an investment annuity policyholder, the Court finds that the rights surrendered by the policyholder are sufficiently extensive to divest him of ownership for the purposes of the tax laws. In reaching this conclusion, the Court is guided by the seminal case of *Helvering v. Clifford,* 309 U.S. 331 (1940). In that case, the Supreme Court held that the creation of a trust, the corpus of which consisted of certain securities owned by the grantor-respondent, did not enable the grantor to escape federal tax liabilities for income earned by the trust. The Court emphasized that the

grantor had retained total control over the management of the securities that comprised the trust corpus, that the transaction was totally intra-familial, *and* that the duration of the trust was only five years, at which time the corpus would be turned to the grantor. On the basis of these factors, the Court concluded:

> So far as his dominion and control were concerned it seems clear that the trust did not effect any substantial change. In substance his control over the corpus was in all essential respects the same after the trust was created as before. The wide powers which he retained included for all practical purposes most of the control which he as an individual would have. There were, we may assume, exceptions, such as his disability to make a gift of the corpus to others during the term of the trust and to make loans to himself. But this dilution in his control would seem to be insignificant and immaterial, since control over investment remained. If it be said that such control is the type of dominion exercised by any trustee, the answer is simple. We have at best a temporary reallocation of income within an intimate family group. Since the income remains in the family and since the husband retains control over the investment, he has rather complete assurance that the trust will not effect any substantial change in his economic position. . . . For as a result of the terms of the trust and the intimacy of the familial relationship respondent retained the substance of full enjoyment of all the rights which previously he had in that property.

309 U.S. at 335-36.

In contrast to the respondent in *Clifford,* investment annuity policyholders have manifestly effected a "substantial change" in their economic positions. While they retain investment control over the account assets, they by no

means retain control over such assets "in all essential respects" as before the investment. As Revenue Ruling 77-85 itself recognizes, investment annuity policyholders are unable to receive the account assets back in kind should they exercise their cash surrender option, and they may not receive any amount directly from the account. This impairment of rights is neither insignificant nor immaterial: Should the policyholder surrender the contract prior to annuitization, he would have to accept the liquidated value of the account assets (instead of the assets—securities, bonds, etc.,—themselves), and he would have to pay full taxes at that time for any appreciation in the account assets from the time the custodian account was established. Thus, unlike the situation in *Clifford,* the investment annuity policyholder forfeits the right to own the account assets in an unliquidated form and assumes the obligation to pay full taxes on asset appreciation should he exercise his right of surrender. The policyholder also divests himself of another important incident of ownership in that after annuitization there can be no policy surrender. In other words, once annuitization of the policy occurs, the policyholder has no right even to receive the liquidated value of the account assets. Accordingly, the Court concludes that the policyholder of an investment annuity contract surrenders substantial enough ownership rights to warrant the conclusion that he is divested of the ownership of the account assets.

Second, the retention of investment control by the policyholder is not such a significant incident of ownership to warrant disparate treatment of investment annuity contracts and standard variable annuity contracts. As defendants concede, the *sole* difference between investment annuity contracts and standard variable annuity contracts is the investment control of the policyholder; and there is no question that the account assets of variable annuity contracts are owned for tax purposes by the issuing life insurance company, despite the fact that the policyholder of a

standard variable annuity possesses the same surrender rights as the policyholder of an investment annuity. While the ability to control investment decisions is one attribute of ownership, it is not necessarily determinative of ownership. Thus, for example, under 26 U.S.C. § 675, the grantor of a trust is not considered the owner merely because he exercises plenary control over investment decisions; rather, he is considered the owner if he exercises such investment control where "the trust funds consist of stocks or securities of corporations in which the holdings of the grantor and trust are significant from the viewpoint of voting control." In view of the incidents of ownership surrendered by the policyholder upon creation of the custodial account, retention of investment control is *not* so significant that the failure to transfer such control to the issuing life insurance company should deprive that company of ownership for taxation purposes, particularly since in both situations the insurance company (1) maintains reserves as required by state law, and (2) assumes the mortality risks for the policyholder. The Court therefore concludes that the distinction drawn by Revenue Ruling 77-85 is unreasonable in light of all the facts of this case.

Third, attribution of ownership of the account assets to the policyholder produces some unreasonable results. In particular, the Service's interpretation would result in current taxation of the appreciation of the account assets even though the policyholder may *never* receive that income or any benefit derived therefrom. Similarly, the Service's interpretation results in treatment of the policyholder as owner of the account assets *even after* annuitization commences—*i.e.,* even after he forfeits any right whatsoever to surrender the contract and receive the liquidated value of the account assets. These seemingly unreasonable results, and perhaps others of which the Court is unaware at this time, provide yet another reason for concluding that the issuing life insurance company and not the policyholder

should be considered the owner of the investment annuity custodial account assets for federal tax purposes.

B. *The Service's Decision in Revenue Ruling 77-85 Was Not Contemporaneous With The Enactment Of Section 801(g)(1)(B), Does Not Reflect a Long-Standing Agency Position, And Is Inconsistent With Earlier Pronouncements, And Even One Subsequent Pronouncement, Of The Agency. Accordingly, Substantial Deference To The Service's Expertise Is Unwarranted In The Instant Case.*

The Supreme Court's discussion in the 1944 case of *Skidmore v. Swift & Co.*, 323 U.S. 134, continues to provide courts with the guideposts for analysis of the degree of deference appropriately accorded to interpretative rulings such as the revenue ruling at issue here. *See General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The *Skidmore* court said:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

323 U.S. at 140. In addition to these factors, courts have generally considered (1) whether the agency's decision was contemporaneous with, or followed soon after, the statute's enactment, *see, e.g., Bingler v. Johnson*, 394 U.S. 741, 749-50 (1969), and (2) whether the agency's interpretation is one of long standing, *see, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974); *United States v. Hall*, 398

F.2d 383, 387 (8th Cir. 1968). *See also* K. Davis, *supra*, § 5.06.

Applying all of these factors to the instant case, it is clear that substantial deference to the Service is unwarranted. The statutory interpretation articulated in Revenue Ruling 77-85 is *not* of long standing and was *not* rendered contemporaneously with or even soon after the enactment of both section 801(g)(1)(B) and section 61; nor was it rendered soon after the Service initially considered the tax status to be accorded plaintiffs' investment annuity contracts. More importantly, Revenue Ruling 77-85 flatly contradicts 12 years of consistent treatment by the IRS and, in addition, it contradicts the position taken in the Service's private ruling of August 29, 1977, which was issued during the pendency of this litigation.[3] *Compare United States v. Consumer Life Insurance Co.*, 430 U.S. 725, 751-52 (1977) (deference to consistent interpretation by state agency).

In the recent case of *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Supreme Court considered similar circumstances in assessing the authoritativeness of an EEOC guideline. The *General Electric* Court concluded:

> We have declined to follow administrative guidelines in the past when they conflicted with the earlier pronouncements of the agency. *United Housing Founda-*

[3] Defendants have attempted to explain away the private ruling of August 29, 1977, as the product of numerous "administrative errors." *See* Affidavit of Albert M. Caflisch, Exhibit A to Defendants' Opposition to Plaintiffs' Request for Immediate Judgment (September 15, 1977). While these alleged "administrative errors" may explain how a private ruling totally inconsistent with a published revenue ruling came to be issued, these procedural errors do not vitiate the fact that as recently as August 29, 1977, some of the Service's experts continued to believe that annuity contracts not materially different from plaintiffs' investment annuity contracts should be treated as "contracts with reserves based on a segregated asset account" within the meaning of section 801(g)(1)(B).

> *tion, Inc. v. Forman,* 421 U.S. 837, 858-859 n.25 (1975); *Espinoza v. Farah Mfg. Co.,* [414 U.S. 86, 92-96 (1973)]. In short, while we do not wholly discount the weight to be given the 1972 guideline, it does not receive high marks when judged by the standards enunciated in *Skidmore, supra.*

429 U.S. at 143. Similarly, Revenue Ruling 77-85 fares quite poorly when measured against the above-articulated factors. Accordingly, the Court will not accord substantial deference to the Service's ruling.

C. *Substantial Deference To The Service's Expertise Is Also Unwarranted Because The Service Was Improperly Motivated By Considerations Of Tax Reform When It Issued Revenue Ruling 77-85.*

The Service explains its sudden shift in its treatment of investment annuity contracts as follows:

> [B]ecause the investment annuity appeared to share many characteristics with conventional annuities, and because there was as yet no basis for suspecting the investment annuity's potential for tax shelter abuse, the Internal Revenue Service issued a series of private rulings based on FIAC contracts which provided the same favorable treatment to the assets in investment annuity custodian accounts as with respect to the assets in segregated asset accounts established under conventional annuities. . . . [I]t has only been recently that tax experts, tax financial journalists, and wealthy investors have fully perceived the tax avoidance capability in investment annuities, and . . . it is only recently that investment annuity sales have begun to mushroom. It is because of these developments that, approximately one year ago, defendants began their reconsideration of their earlier private letter ruling policy.

Defendants' Memorandum of June 13, 1977, at 13. Nowhere do defendants even contend that they have discovered "some new source of legislative history in the intervening . . . years." *General Electric Co. v. Gilbert,* 429 U.S. at 143. Defendants' counsel has argued that the Service for the first time *focused* on the difficult question of ownership during this past year: Until this time, he argues, "the Service had not had any factual predicate upon which to be stimulated to look at [investment annuity contracts] with a sufficiently perceptive view." Transcript of June 17, 1977, at 12. This explanation, however, bears a striking resemblance to that proffered by the Service in *Fribourg Navigation Co. v. Commissioner,* 383 U.S. 272 (1966), and the Supreme Court's response to that explanation seems equally appropriate in the instant case:

> The Commissioner's position represents a sudden and unwarranted volteface from a consistent administrative [practice] . . . . Against this array of authority, the Commissioner contends that he did not "focus" on the issue in most of these instances. This is hardly a persuasive response to the overwhelmingly consistent display of his position.

383 U.S. at 279-80.

Defendants' explanation for the reconsidered interpretation propounded by Revenue Ruling 77-85 indicates quite clearly that the Service was motivated in its "reconsideration" to take a narrow view of section 801(g)(1)(B) as applied to investment annuity contracts because the Service felt that such contracts "create the possibility of major tax shelter abuse," Defendants' Memorandum of June 13, 1977, at 40, and because growing numbers of persons were beginning to purchase investment annuity contracts. In fact, defendants go so far as to argue that the Court should consider the "equities" of such potential "tax shelter abuse" in interpreting section 801(g)(1)(B). *Id.* at 40-41.

Defendants' counsel candidly admitted at the last hearing on the merits that Revenue Ruling 77-85 was the result of a "massive reconsideration of policy by the Service." Transcript of October 11, 1977, at 28. While such a reconsideration of policy may indeed be desirable, Congress, not the Internal Revenue Service, is the appropriate body to consider such substantive changes in the tax laws. As the Supreme Court recently said in *United States v. Consumers Life Insurance Co.*, 430 U.S. 725, 750 n.34 (1977):

> We of course are called upon to apply the statute as it is written. Furthermore, the interpretation for which the Government contends "would have wide ramifications which we are not prepared to visit upon taxpayers, absent congressional guidance in this direction." *Commissioner v. Brown,* 380 U.S. [563, 575 (1965)]. *If changes are thought necessary, that is Congress' business.*

(Emphasis added.) Accordingly, the Court concludes that the Service was improperly motivated by considerations of tax reform when it issued Revenue Ruling 77-85, and the Service's decision is not entitled to substantial deference under such circumstances.

D. *The Court Will Grant Plaintiffs Substantially All The Declaratory Relief They Seek But Will Withhold Granting Any Injunctive Relief At This Time.*

For the reasons stated in subsection A, *supra,* and because, as demonstrated in subsections B and C, *supra,* the Service is not entitled to substantial deference under the circumstances of this case, the Court concludes that Revenue Ruling 77-85 is an erroneous and unreasonable interpretation of sections 801(g)(1)(B) and 61 of the Internal Revenue Code, and it is therefore unlawful and beyond the Service's statutory authority. Under these circumstances, plaintiffs are clearly entitled to, and the Court will grant them, substantially all the declaratory relief they seek.

Thus, the Court will declare: (1) that Revenue Ruling 77-85 is erroneous and unreasonable, and is therefore unlawful and beyond the statutory authority of the Internal Revenue Service; (2) that custodial account assets of plaintiff FIAC's investment annuity contracts are, for federal tax purposes, owned by the issuing life insurance company and not the policyholder; and (3) that plaintiff FIAC's investment annuity contracts are "contracts with reserves based on a segregated asset account" within the meaning of 26 U.S.C. § 801(g)(1)(B). The only declaratory relief sought that the Court will not grant are those portions of plaintiffs' prayer for relief that ask the Court to prescribe the particular tax consequences of treating investment annuity contracts as "contracts with reserves based on a segregated asset account" within the meaning of section 801(g)(1)(B).

In addition to declaratory relief, plaintiffs pray the Court to grant appropriate injunctive relief. Specifically, they ask the Court to enjoin the defendants, and their agents, employees, attorneys, and all persons in concert or participation with them, from giving any effect whatsoever to Revenue Ruling 77-85 (except for the contributions permitted therein) and from taking, or directing others to take, any position inconsistent with the declaratory relief sought herein. In addition, they ask the Court to require said persons to make all future determinations with respect to FIAC investment annuity contracts in a manner consistent with the declaratory relief sought herein.

While this Court undoubtedly has the authority to grant broad injunctive relief against the Internal Revenue Service in an appropriate case, such relief does not appear to be necessary at this time. Rather, the Court prefers to withhold the requested injunctive relief based on its confident assumption that the defendants will proceed appropriately, in good faith, and in a manner fully consistent with the declaratory relief granted herein without the

coercion of a court order. *See Dunlop v. Bachowski*, 421 U.S. 560, 577 (1975).

An Order in accordance with the foregoing will be issued of even date herewith.

/s/ Charles R. Richey 11/9/1977
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 77-810

Investment Annuity, Inc., et al., *Plaintiffs*,

v.

W. Michael Blumenthal, et al., *Defendants*.

Order

(Filed November 9, 1977)

Upon consideration of the points and authorities submitted by the respective parties, and the entire record herein, and it appearing that there are no material facts in dispute, and it further appearing that, pursuant to the stipulation of the parties, final disposition of the merits herein is appropriate, and for the reasons set forth in the Memorandum Opinion issued of even date herewith, it is, by the Court, this 9th day of November, 1977,

Ordered, Adjudged and Decreed, that Revenue Ruling 77-85, issued by the Internal Revenue Service on March 9, 1977, be, and the same hereby is, declared to be erroneous and unreasonable, and it is therefore declared to be unlawful and beyond the statutory authority of the Internal Revenue Service; and it is

Further Ordered, Adjudged and Decreed that the custodial account assets of plaintiff FIAC's investment annuity contracts be, and the same hereby are, declared to be owned by the issuing life insurance company for federal tax purposes; and it is

Further Ordered, Adjudged and Decreed, that plaintiff FIAC's investment annuity contracts be, and the same hereby are, declared to be "contracts with reserves based on a

segregated asset account" within the meaning of 26 U.S.C. § 801(g)(1)(B); and it is

FURTHER ORDERED, that the remaining relief sought by plaintiffs be, and the same hereby is, denied without prejudice.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0810

INVESTMENT ANNUITY, INC., et al., *Plaintiffs,*

v.

W. MICHAEL BLUMENTHAL, et al., *Defendants.*

Order

(Filed December 8, 1977)

WHEREAS, the Court has entered its Order on November 9, 1977 containing a declaratory judgment with respect to the merits involved herein, and

WHEREAS, the plaintiffs have requested injunctive relief, which was the subject of a hearing before this Court on December 5, 1977, at which time the Court determined to grant that relief in part and to deny other aspects of that relief requested by plaintiffs;

NOW, THEREFORE, it is hereby ORDERED,

(1) In accordance with the provisions of *Rev. Rul. 77-85,* defendants, W. Michael Blumenthal, Jerome A. Kurtz, and their successors, shall not treat as taxable to the policyholder income or gain from assets contributed to custodial accounts created pursuant to investment annuity policies entered into between the plaintiffs and such policyholder on or before March 9, 1977.

(2) Defendants shall not treat income or gain from assets contributed after March 9, 1977 to plaintiffs' investment annuity policy custodial accounts as currently taxable to policyholders; *provided,* that in the event that defendants appeal from the Orders entered in this action and

prevail in that appeal, defendants may retroactively assess and collect taxes against these policyholders with respect to income and gain from assets contributed after March 9, 1977 to plaintiffs' investment annuity policy custodial accounts.

(3) The Court hereby retains jurisdiction to enter such further orders and grant such further relief as may be necessary or appropriate.

Dated: December 8th, 1977.

/s/ CHARLES R. RICHEY
Charles R. Richey
Judge

Approved as to form:

/s/ HERBERT L. AWE
Herbert L. Awe
Counsel for Plaintiffs

/s/ DONALD J. GAVIN
Donald J. Gavin
Counsel for Defendants

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

No. 78-1106
D.C. Civil No. 77-0810

INVESTMENT ANNUITY, INC., et al.

v.

W. MICHAEL BLUMENTHAL as Secretary of the Treasury of the United States, et al., *Appellants*

Appeal from the United States District Court for the District of Columbia.

BEFORE: WRIGHT, Chief Judge, and McGOWAN and LEVENTHAL, Circuit Judges.

Judgment

(Filed October 5, 1979)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed, and the case is remanded with instructions to dismiss the complaint for lack of jurisdiction, in accordance with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Date: October 5, 1979

Opinion for the Court filed by Circuit Judge LEVENTHAL.

APPENDIX D

CONSTITUTION OF THE UNITED STATES:

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

AMENDMENT V

. . . nor be deprived of life, liberty, or property, without due process of law; . . .

INTERNAL REVENUE CODE OF 1954, as amended (26 U.S.C.):

SEC. 801(g).

(g) CONTRACTS WITH RESERVES BASED ON SEGREGATED ASSET ACCOUNTS.—

(1) DEFINITIONS.—

* * *

(B) CONTRACTS WITH RESERVES BASED ON A SEGREGATED ASSET ACCOUNT.—For purposes of this part, a "contract with reserves based on a segregated asset account" is a contract—

(i) which provides for the allocation of all or part of the amounts received under the contract to an account which, pursuant to State law or regulation, is segregated from the general asset accounts of the company,

(ii) which is described in subparagraph (A), (B), (C), (D), or (E) of section 805(d)(1) (other than a life, health or accident, property, casualty, or liability insurance contract) or which provides for the payment of annuities, and

(iii) under which the amounts paid in, or the amount paid out, reflect the investment return and the market value of the segregated asset account.

If a contract ceases to reflect current investment return and current market value, such contract shall not be considered as meeting the requirements of clause (iii) after such cessation.

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) TAX.—Except as provided in sections 6212(a) and (c), 6213(a), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

28 U.S.C. § 2201.

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

As amended Oct. 4, 1976, Pub.L. 94-455, Title XIII, § 1306(b)(8), 90 Stat. 1719.

Internal Revenue Code of 1954, as amended. (26 U.S.C.)

Supreme Court, U. S.
FILED
MAY 3 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-1280 and 79-1281

In the Supreme Court of the United States

OCTOBER TERM, 1979

FIRST INVESTMENT ANNUITY COMPANY OF AMERICA, INVESTMENT ANNUITY, INC., PETITIONERS

v.

G. WILLIAM MILLER, SECRETARY OF THE TREASURY OF THE UNITED STATES, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinions of the district court (Pet. App. B 21a-60a) are reported at 437 F. Supp. 1095 and 442 F. Supp. 681. The opinion of the court of appeals (Pet. App. A 1a-20a) is reported at 609 F. 2d 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. C 65a) was entered on October 5, 1979. By order dated January 3, 1980, the Chief Justice extended the time within which to file a petition for a writ of certiorari to February 19, 1980, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an action for a judgment declaring invalid the Internal Revenue Service's revocation of favorable private letter rulings previously issued with respect to the tax treatment of investment annuity contracts sold by petitioners and for an order enjoining enforcement of the revocation of the prior rulings is barred by the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201, and the Anti-Injunction Act, 26 U.S.C. 7421.

STATUTES INVOLVED

The pertinent provisions of Sections 801(g) and 7421 of the Internal Revenue Code of 1954 (26 U.S.C.) and 28 U.S.C. 2201 are set forth at Pet. App. D 68a-69a.

STATEMENT

1. Petitioner First Investment Annuity Company of America (FIAC)[1] was organized by its former parent corporation, Investment Annuity, Inc. (IAI), for the purpose of issuing and marketing tax shelters known as investment annuity contracts. Petitioners instituted this action in the United States District Court for the District of Columbia seeking a declaratory judgment that Rev. Rul. 77-85, 1977-1 Cum. Bull. 12, is invalid, and an injunction against enforcement of the ruling.

---

[1]Petitioner IAI was the parent corporation of petitioner FIAC at the time the complaint was filed in the district court. Subsequently, IAI sold all of its FIAC stock to Life Insurance Company of North America. IAI and FIAC have filed separate petitions for certiorari.

FIAC began marketing investment annuity contracts in 1965. Under these contracts, an investor transfers assets to a custodian account, pursuant to an agreement which provides the investor with substantial control over the assets and the income therefrom, and which contemplates the ultimate purchase of an annuity funded by the assets in the custodian account.[2] In a series of private letter rulings beginning in 1965, the Internal Revenue Service ruled that the investment earnings of the custodial accounts were not currently taxable to the respective

---

[2]The specific details of the investment annuity arrangement were as follows: The investment annuity contract established a custodial account with a third party (usually a bank) into which the policyholder transferred a minimum amount (in cash or other assets) that he could supplement at any time prior to the starting date of the annuity. The assets in the account were nominally the property of the insurance company, and were pledged to the purchase of an annuity. The company also received a percentage of the assets as an annual premium on an annuity policy. Any assets remaining in the account at the policyholder's death became the company's property as a terminal premium. The assets in the account were invested at the direction of the policyholder. While investment options were limited to those on an approved list, such lists normally included publicly traded securities, government obligations, certificates of deposit, savings accounts, commercial paper, and life insurance. The policyholder could at any time direct the custodian to sell, purchase or exchange assets held in the account, and to reinvest income. The policyholder also retained the power to direct the voting of the securities or to exercise any other rights pertaining to the assets. While the assets in the custodial account could not be returned directly to the policyholder, full or partial surrender of the annuity policy was permitted prior to the starting date. In those circumstances, the custodian would sell the assets and pay the proceeds over to the insurance company, which in turn would pay them to the policyholder less any cash surrender charges. Should the policyholder die before the starting date, the custodial account would be liquidated and the proceeds paid to the policyholder's beneficiaries in the same manner (Pet. App. A 3a).

policyholders-investors, but were taxable to the insurance company. These rulings held that the policyholder's tax on the investment income was deferred until the income was received by him in the form of the annuity payments that would be forthcoming under the contract. The position taken in these rulings rested upon the determination that the assets in the policyholder's custodial account were owned by the insurance company and not the policyholder (Pet. App. A 4a).

During the initial period following the issuance of the Internal Revenue Service's rulings, FIAC's sales of investment annuity contracts were relatively modest. Subsequently, however, business and financial publications heralded the contracts as permitting investors to avoid taxation on investment earnings while retaining control and liquidity with respect to their assets.[3] The company's sales of the investment annuities thereupon increased dramatically (Pet. App. A 4a). As a result of the extensive publicity proclaiming investment annuities as the ideal tax shelter and the substantial increase in the sales of such annuities, the Internal Revenue Service began to reconsider its rulings that the investment earnings from custodial accounts were currently taxable to the insurance company rather than the policyholder (Pet. App. A 4a-5a).

[3]The purported ability to obtain tax deferral while retaining control over the invested assets prompted the financial press to characterize the investment annuity the "wraparound" annuity because it permitted investors to defer current income merely by "wrapping" an annuity around an existing investment (Pet. App. A 5a).

On March 9, 1977, the Service issued Rev. Rul. 77-85, which revoked the prior favorable tax treatment accorded investment annuity policyholders. The new ruling held that because of the substantial incidents of ownership retained by the investment annuity policyholder with respect to the assets in his custodial account, the policyholder, and not the insurance company, was the owner of those assets for federal tax purposes. The ruling therefore concluded that the policyholder was currently taxable on the earnings from the custodial account. At the urging of representatives of FIAC, however, the ruling contained a "grandfather" provision, as authorized by Section 7805(b) of the Internal Revenue Code, permitting continued favorable tax treatment for existing policyholders provided they made no contributions to their custodial accounts after March 9, 1977 (Pet. App. A 5a).

Following the issuance of Rev. Rul. 77-85, representatives of companies selling investment annuities sought legislation to delay the effective date of the ruling for one year so that industry members could seek permanent legislation reversing the position taken in the ruling. Although a Senate floor amendment to H.R. 3477, the Tax Reduction and Simplication Bill of 1977, would have so delayed the effective date of the ruling (J.A. 162-167),[4] Congress rejected the proposal on May 3, 1977 (J.A. 148-161).

2. Shortly thereafter, petitioners filed this suit. The government moved to dismiss the action on the ground that it was barred by the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act. In response, petitioners asserted that because existing contracts had

[4]"J.A." refers to the joint appendix filed in the court of appeals.

been "grandfathered" by the Service and because further sales of contracts were not feasible, the validity of Rev. Rul. 77-85 could not be litigated in a suit for redetermination of a deficiency in the Tax Court or in a refund suit. Petitioners claimed that the validity of the Commissioner's ruling would never be subject to judicial review if their action were dismissed.

The district court agreed with petitioners that the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act were not "intended to preclude pre-enforcement review of Service actions where the action will otherwise *never* be subject to judicial review" (Pet. App. B 27a) (emphasis in original). The court, however, was not convinced that judicial review could not otherwise be obtained. Accordingly, the district court directed petitioners to seek the permission of the Pennsylvania Insurance Commissioner and the Securities and Exchange Commission to sell a single additional policy to a cooperative purchaser, who could then challenge the ruling in a refund suit.[5] When these authorities refused to permit the sale of a new policy for the purpose of arranging a test case,[6] the district court

[5]In anticipation of the issuance of Rev. Rul. 77-85, the Pennsylvania Insurance Commissioner notified FIAC on March 8, 1977, that no further sales of investment annuity contracts could be made without his prior approval. On March 7, 1977, the SEC rescinded the "no-action" letter upon which FIAC had been relying in selling its annuity contracts. FIAC ceased selling investment annuity policies as of March 8, 1977, and has made no sales of those policies since that date.

[6]The Insurance Commissioner's refusal to approve an additional sale, even for the purpose of permitting a test case, was premised on his evaluation that the public interest would best be served by a speedy resolution of the controversy by means of the instant

concluded that no other access to judicial review of the ruling was feasible and denied the government's motion to dismiss (Pet. App. B 34a-37a). Thereafter, the court held that Rev. Rul. 77-85 was invalid, and enjoined the Internal Revenue Service from enforcing the ruling to the extent it would increase the tax liability of investment annuity purchasers (Pet. App. B 38a-64a).

The court of appeals reversed and remanded the case to the district court with instructions to dismiss the complaint for lack of jurisdiction. It held that the decisions of this Court made it clear that the Anti-Injunction Act is to be given literal effect unless the plaintiff meets the two-part test set forth in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1 (1962). There, this Court held that no suit may be brought to enjoin the assessment and collection of taxes unless equity jurisdiction otherwise exists and under no circumstances could the government prevail on the merits of its claim. Here, petitioner FIAC had not even contended that its case came within the *Williams Packing* exception. Moreover, petitioner IAI had failed to support its assertion that it met the two-part *Williams Packing* test. The court of appeals therefore concluded that the plain terms of the Anti-Injunction Act barred the suit (Pet. App. A 1a-20a).

Finally, the court rejected petitioners' contention that dismissal of the suit deprived petitioners of property without due process. In this respect, the court concluded

declaratory judgment action in the district court, rather than through a more time-consuming third-party refund suit (Pet. App. A 15a; J.A. 188-191, 225-226). The SEC's refusal to reinstate its "no action" letter was based on the actions of the Insurance Commissioner. There is nothing in the record to suggest that the SEC would block the sale of an additional policy in the event the Insurance Commissioner were to grant permission for such a sale (Pet. App. A 15a; J.A. 199).

that Rev. Rul 77-85 did not infringe upon any constitutionally protected property right of petitioners because the issuance of the ruling did not increase petitioners' tax liability but only that of their policyholders. The court therefore held that even on the assumption that petitioners had no other means to obtain judicial review of the validity of ruling, the application of the Anti-Injunction Act to bar petitioners' action did not violate their right to due process (Pet. App. A 13a-14a).

ARGUMENT

I. The decision below correctly held that petitioners' suit to enjoin the enforcement of Rev. Rul. 77-85 was barred by the Anti-Injunction Act.[7] That statute explicitly states that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *" (Pet. App. D 69a). In so concluding, the court of appeals properly followed the well-settled line of decisions of this Court ruling that the literal language of the Act prohibits such injunctive actions unless the plaintiff can show: (1) that equity jurisdiction otherwise exists; and (2) that under no circumstances can the government prevail on the merits of its claim. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1 (1962); *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974); *Commissioner* v. *"Americans United", Inc.*, 416 U.S. 752 (1974); *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974).

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[7]The court of appeals also held that the language of the Declaratory Judgment Act (28 U.S.C. 2201), excepting all suits "with respect to Federal taxes," "is, if anything, more restrictive" than the Anti-Injunction Act (Pet. App. A 7a). However, because it concluded that the reach of the two Acts is coterminous, its analysis focused on the Anti-Injunction Act.

Here, petitioners do not contend that they are able to meet the second part of the *Williams Packing Co.* test and show that under no circumstances would the government prevail on the merits of its claim. But despite this Court's consistent adherence to the *Williams Packing Co.* test as the sole exception to the flat prohibition of the Anti-Injunction Act, petitioners urge that there is a further exception for those parties having no other access to judicial review.[8] In support of this argument, petitioners rely upon this Court's statement in *Bob Jones University* v. *Simon*, *supra*, 416 U.S. at 746, that "[t]his is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different."

But as the court of appeals correctly recognized (Pet. App. A 12a), this Court's statement in *Bob Jones University* concerning the unavailability of judicial review was made in the context of a hypothetical case in which a

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[8]For purposes of its decision, the court of appeals assumed that because of the Pennsylvania Insurance Commissioner's refusal to permit the sale of an additional policy for the purpose of arranging a policyholder refund suit, petitioners would not be able to obtain judicial review of Rev. Rul. 77-85 in the event this suit were dismissed.

It is by no means certain, however, that a refund suit challenging the ruling will never be possible. As the court of appeals pointed out (Pet. App. A 15a, n.28), the Pennsylvania Insurance Commissioner's action in blocking a sale to a cooperative third party was premised on his evaluation at that time that the public interest would best be served by a speedy resolution of the tax issue by means of this injunctive action rather than through the slower process of a refund suit. Accordingly, should this Court deny certiorari, the Pennsylvania Insurance Commissioner may well change his assessment and permit a test refund suit by an investor to proceed.

taxpayer has no access to the courts to contest his own tax liability. Here, however, petitioners' tax liabilities are not at issue. Indeed, the Commissioner's ruling relieves them of tax liability on the income earned by the assets placed in the custodial accounts and imposes such liability on the investors. There is accordingly no basis in *Bob Jones University*, or elsewhere, for petitioners' claim that the Anti-Injunction Act is not applicable to suits by persons who may be adversely affected by the Commissioner's actions pertaining to the tax liabilities of third parties where such third parties cannot or will not contest the Commissioner's determination in the courts.[9] See *EDUCO, Inc.* v. *Alexander*, 557 F. 2d 617 (7th Cir. 1977).

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[9]As the court of appeals correctly noted (Pet. App. A 14a), there are numerous instances in which administrative actions by the Internal Revenue Service may adversely affect individuals or organizations whose own tax liabilities are not involved. For example, imposition of a greater tax on a corporation may mean smaller dividends to the shareholders; increases in tax on their customers may adversely affect suppliers; increases in taxes on employers may adversely affect their employees. Moreover, in many situations such collaterally affected parties may have no access to judicial review of the administrative action. Thus, prior to the enactment of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2841, there was as a practical matter no effective appeal from a determination by the Service that a proposed issue of municipal bonds was taxable, since the absence of a favorable ruling invariably makes it impossible to market the bonds and since direct suit by the state or local government challenging the ruling was not possible. See S. Rep. No. 95-1263, 95th Cong., 2d Sess. 533-534 (1978). To remedy this situation, Congress added Section 7478 to the Code, which allows a state or local government to obtain a declaratory judgment in the Tax Court as to the tax status of a proposed issue of municipal bonds.

Petitioners' situation is similar to that of the issuers of municipal bonds prior to the enactment of Section 7478. But Congress has not seen fit to lift the bar of the Act and the tax exception to the Declaratory Judgment Act in the circumstances of this case.

2. Petitioners further argue (Pet. 14-19) that the application of the Anti-Injunction Act to bar their suit violates their right to due process. But as the court of appeals correctly concluded (Pet. App. A 13a-14a), the issuance of Rev. Rul. 77-85 did not deprive petitioners of any property right cognizable under the Constitution. "To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents* v. *Roth*, 408 U.S. 564, 544 (1972). See also *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Bishop* v. *Wood*, 426 U.S. 341 (1976).

Here, the issuance of the ruling did not deprive petitioners of any benefit to which they had a vested claim. Rev. Rul. 77-85 did not increase petitioners' tax liability; nor did it prohibit continued sales of petitioners' investment annuities policies. To the contrary, the ruling did no more than revoke the private letter rulings previously issued to petitioners, in which the Service had ruled that earnings from custodial accounts were not currently taxable to petitioners' policyholders.

Petitioners' due process argument necessarily rests upon the proposition that the issuance of the private rulings created a property interest cognizable under the due process clause of the Fifth Amendment.[10] But as the

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[10]Petitioners' claim that Rev. Rul. 77-85 deprived them of a property interest conferred by statute, *i.e.*, Section 801(g) of the Internal Revenue Code of 1954, begs the question. The ruling, of course, holds that petitioners' annuity policies do not meet the definitional requirements of Section 801(g). The only contrary authority, at the time the ruling was issued, was the private letter rulings issued by the Service to the petitioners. It is therefore apparent that the ruling did not deprive petitioners of a right conferred by statute but rather merely reversed the Service's own administrative interpretation of the law.

decision below correctly recognized (Pet. App. A 14a), the private rulings were simply an expression of the Service's interpretation at that time of the application of the tax laws to holders of investment annuity policies issued by petitioners. The rulings did not have the force of law and created no obligation for the Internal Revenue Service to adhere in the future to that position. See *Dixon* v. *United States*, 381 U.S. 68 (1965); *Automobile Club* v. *Commissioner*, 353 U.S. 180 (1957); *Wisconsin Nipple & Fabricating Corp.* v. *Commissioner*, 581 F. 2d 1235 (7th Cir. 1978); *Stubbs, Overbeck & Associates* v. *United States*, 445 F. 2d 1142 (5th Cir. 1971). To the contrary, as petitioners acknowledge (Pet. 17), the rulings were subject to revocation at any time. *Dixon* v. *United States*, *supra*. Thus, although the letter rulings created a benefit, petitioners had no property right to that benefit. Instead, as in *Board of Regents*, *supra*, there simply was a unilateral expectation on petitioners' part that the benefit conferred by the rulings would continue indefinitely. However, such an expectation does not rise to the level of a constitutionally protected property interest.

Finally, petitioners assert (Pet. 19-22) that the court of appeals' application of the Anti-Injunction Act is unconstitutional because it removes jurisdiction from all courts to determine the validity of Rev. Rul. 77-85 and thus results in a delegation of unlimited legislative power to the Internal Revenue Service. But the authority of Congress to determine the extent to which suits against the United States will be permitted is a consequence of the doctrine of sovereign immunity. While this doctrine may yield in a case where the actions of the United States or its officials implicate a constitutionally protected property or

liberty interest of the complainant, there is, as we have shown, no such protected interest involved here. Accordingly, the application of the Anti-Injunction Act to bar petitioners' suit is fully in accord with the requirements of the Constitution.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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